

RESURGENCE OF THE RIVER TREASURE: JEFFERSON PUD AND A COMPREHENSIVE PLAN FOR HYDROELECTRIC POWER

INTRODUCTION

In May of 1994, the United States Supreme Court determined that the Clean Water Act restored at least some state power over river management decisions.¹ In *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, the Court held that section 401 of the Clean Water Act (CWA) allows states to satisfy their water quality standards by imposing conditions on federal licenses for hydropower projects.² This ruling seems to partially deflate forty-eight years of Supreme Court precedent holding that the Federal Power Commission (FPC) had exclusive and unconditional authority to license private hydroelectric projects according to the Federal Power Act of 1920 (FPA).³ The return of state planning powers comes just in time to protect our nation's river resources.

The Supreme Court's prior decisions to allow the federal government unrestricted authority to plan and manage hydropower development according to the FPA were based on a ruling from 1946, when the nation had just emerged from World War II and sought new power sources to drive unprecedented industrialization.⁴ Today, fifty years after many hydroelectric projects were first licensed by the FPC, conditions have changed on our nation's rivers. Where it once was necessary to consolidate resources in support of a burgeoning national infrastructure, now there is demand for multiple uses and for more sustainable management of water resources at the state and local levels.⁵

In the aftermath of the energy crisis of the 1970s, this country was driven by new federal legislation to seek out local energy supplies derived from renewable resources.⁶ Since then, FERC has been flooded with new

1. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994) [hereinafter *Jefferson PUD*]. See *infra* Part III.B.

2. *Id.* at 1909.

3. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 168-170 (1946) [hereinafter *First Iowa*]. See *infra* Part II.B. The Federal Energy Regulatory Commission (FERC) is the successor to the FPC.

4. *Id.*

5. David H. Getches, *Water Resources: A Wider World*, in NATURAL RESOURCES POLICY AND LAW 125 (MacDonnell ed., 1993).

6. The Public Utility Regulatory Policies Act (PURPA), Pub. L. No. 95-617, 92 Stat. 3206 (1978) (codified in 50 U.S.C. §§ 7, 10, 12, 15, 16, 30, and 42). See *infra* Part II.C.

applications for the development of small hydroelectric projects,⁷ implementation of the CWA has improved water quality, and Americans are swarming to rivers for recreation, including white-water sports and fishing.⁸ Conflicting demands for river resources prompt new concern for the total environmental and social cost of hydropower development. As more than 250 fifty-year term federal licenses come up for renewal, states demand renewed authority to manage competing interests in their rivers.

Despite its firm reading of the CWA's delegation of state authority to regulate for water quality, the *Jefferson PUD* decision reserved judgment on the issue of how to resolve actual conflicts between FERC licensing criteria and state water quality certifications.⁹ It remains to be decided whether the FPA preempts a state's capacity to condition project operation according to the CWA. The resolution of this critical question will determine the balance of federal and state authority to regulate hydropower development on America's rivers.

FERC has chosen to test the question of federal and state jurisdiction at the site of a tiny historic mill in Tunbridge, Vermont. A proposal to renovate the inactive Tunbridge mill facility to provide small-scale, local electrical power has raised a conflict over whether Vermont, through its water quality certification, can reserve state authority to control and oversee future operations at the mill.¹⁰ FERC has refused to incorporate three procedural provisions of Vermont's 401 certification in the federal license for the Tunbridge project.¹¹ The conditions require approval by the Vermont Department of Environmental Conservation of any proposal to change operations or engage in any construction at the Tunbridge site and allow the Department to modify the terms of the permit at any time to protect water quality.¹² Section 401 of the CWA requires states to certify that federally licensed hydroelectric facilities will comply with all conditions that the state must impose to ensure compliance with the Act.¹³ The Commission argues that the CWA only grants states the power to regulate for water quality, and alleges that only FERC has the power to

7. *Small Hydro Program: Hearing Before the House Subcommittee on Energy Conservation and Power*, 98th Cong., 2d Sess. 39 (1984) (letter from Raymond O'Connor, Chairman of FERC, Sept. 11, 1984) [hereinafter *Small Hydro Hearings*].

8. William L. Plouffe, *Forty Years After First Iowa: A Call For Greater State Control of River Resources*, 71 CORNELL L. REV. 833, 834 (1986).

9. *Jefferson PUD*, 114 S. Ct. at 1914.

10. See *infra* Part IV.

11. FERC, Order Issuing License for Project No. 11090-000 at 10-13 [hereinafter *Order*].

12. Office of Attorney General, Application for Rehearing (Aug. 12, 1994) [hereinafter *Application*].

13. 33 U.S.C. §§ 1341(a)(1), 1341(d) (1988).

determine whether state 401 certification conditions pertain to water quality.¹⁴ Challengers contend that the CWA does not allow FERC such discretion but that section 401 dictates that the Commission must incorporate into hydroelectric licenses all components of state water quality certifications.¹⁵ FERC has granted a rehearing to reconsider its treatment of Vermont's 401 certification for the Tunbridge project.¹⁶ If the Commission remains determined to refute state authority over management decisions at hydroelectric facilities, the federal legislature or the courts may resolve the bounds of federal and state regulatory power. This circumstance provides an opportunity to invoke a cooperative and comprehensive approach to federal and state management of American rivers.

Part I of this note documents the development of early American water law and traces the increase of public interest in the river resource and the expansion of federal regulatory authority under broad readings of the Commerce Clause.¹⁷ It will describe how the FPA's goal of balanced federal and state authority over water management decisions soon eroded at the onset of expanding federal power. Part II illustrates the environmental impacts of hydroelectric power and discusses how the Supreme Court's interpretation of the FPA in 1946 allowed the federal government unrestricted authority to license hydropower development.¹⁸

After a brief illustration of the shortcomings of FERC's planning procedures for water resources, Part III discusses relevant portions of the CWA and sets out conflicting legal interpretations of state authority to condition federal licenses for the attainment of water quality.¹⁹ Part III analyzes the Supreme Court's recent determination that state water quality certificates must be incorporated into federal licenses for hydroelectric projects and illustrates the implications of that decision for the balance of federal and state jurisdiction. Part IV describes how the proposal to renovate a mill in Tunbridge, Vermont, tests the Supreme Court's reserved question of the proper interplay between FERC's licensing power pursuant to the FPA and state certification authority under the CWA.²⁰ This final part also provides a legal interpretation of the balance between federal and

14. See *infra* Part III.A.

15. See *infra* Part III.B.

16. FERC, Order Granting Rehearing for Further Consideration of Project No. 11090-001 (Sept. 14, 1994) [hereinafter Rehearing].

17. See *infra* Part I.

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

state regulatory authority over hydroelectric power and suggests a potential for cooperative and comprehensive management planning.

In conclusion, this note argues that states should retain the power to impose conditions on federal licenses for hydroelectric facilities in order to protect water quality and to encourage citizen involvement in local energy planning. At the same time, the federal government should exercise its comprehensive planning power to guarantee equitable distribution of the nation's energy burden and to provide foresight for state and local decision-making.

I. THE EVOLUTION OF FEDERAL JURISDICTION OVER WATER POWER

A. *Growing Public Interest in the "Water Resource"*

This nation drew its notions of social policy from English tradition as recorded in the common law.²¹ In England, the right to use naturally flowing water was reserved to those individuals who owned land abutting the water source.²² Under this riparian doctrine, as adopted by American courts, those with waterfront property were entitled to as much water as they could use on their land, save only that they not interfere with the reasonable use of water by other riparian owners.²³ In the context of a plentiful water supply, the early colonists and first independent states relied on this simple rule of water management. Consequently, the riparian doctrine became the basis for private water law in the eastern half of this country.²⁴

Early treatment of water diversion as one aspect of real property rights raised foreseeable problems as demand for water resources increased.²⁵ This problem was most pronounced in the context of river systems. As industry flourished and more people relied on streamflows for power, diversion of running water became a legal issue between upstream and downstream riparian users.²⁶ Heightened demand for water use and conflicting claims to a common resource invoked public interest in government regulation.

21. Denis J. Brion, *The Common Law of Water Power in New England*, 5 VT. L. REV. 201, 202 (1980); ROBERT CLARK, 1 WATERS AND WATER RIGHTS § 15.2 (1967).

22. CLARK, *supra* note 21, at § 4.3.

23. *Id.* at § 16.2.

24. WILLIAM GOLDFARB, WATER LAW 7 (1984).

25. Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL. STUD. 261, 261-62 (1990).

26. *Id.* at 263-64.

In 1842; the Supreme Court linked water rights with the principles that formed our national government:

For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.²⁷

Individuals were granted autonomy over riparian uses until one person's use resulted in excessive impairment of the common good, at which point the state could invoke its police power to regulate water use for the general welfare.²⁸ State sovereignty over water management decisions made sense in an era when our federal government did not have sufficient resources to address local concerns. Conditions varied between states as between rivers, so that it was both pragmatic and appropriate to allow citizens to exercise management responsibility over riparian resources.²⁹ However, as the nation invested increased resources in centralized government and water power became recognized as a national interest, federal jurisdiction over water regulation expanded.

The United States Constitution grants Congress the power to regulate interstate commerce.³⁰ In 1824, the Supreme Court incorporated navigation into the definition of commerce.³¹ In *Gibbons v. Ogden*, plaintiff Gibbons was licensed to operate a ferry system between New York and New Jersey under a 1793 federal law.³² Gibbons challenged New York State's issuance of an exclusive license for defendant Ogden to operate ferryboat service between New York City and Elizabethtown, New Jersey.³³ Rather than attempting to distinguish between New York and

27. *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). Article X of the United States Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. art. X.

28. The police power is inherent in the sovereign (the state) and can be delegated by the states to local governments they create. See DAVID B. FIRESTONE, ENVIRONMENTAL LAW FOR NON-LAWYERS 19 (1993).

29. Indeed, this principle still rings true to some courts. See *California v. United States*, 438 U.S. 645, 649 (1978), and *infra* notes 138 - 169 and accompanying text. Cf. *Keating v. Federal Energy Regulatory Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991), and *infra* note 388 and accompanying text.

30. U.S. CONST. art. I, § 8, cl. 3 states that "the Congress shall have the power . . . [t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

31. *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824).

32. *Id.* at 2.

33. *Id.*

New Jersey waters, each subject to state regulation, Justice Marshall determined that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."³⁴ The eager federalist Justice established the distinction between a state's police power authority to regulate for the health and safety of its citizens and its inability to interfere with the exclusively federal power to regulate interstate commerce.³⁵ This formalistic definition of federalist powers perpetuated controversies regarding the proper interplay between federal and state control over water management decisions. Today, Marshall's distinction between commerce and public health is not so clear.³⁶

During the Industrial Revolution, waterpower was the most common source of energy in the United States.³⁷ Perhaps the best statements of early twentieth century public interest in the river resource came from the pen of Justice Oliver Wendell Holmes. In 1916, when deciding whether to allow the Alabama Interstate Power Company to condemn private property for the development of a dam, the Chief Justice wrote that "to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare."³⁸ Fifteen years later, in an opinion granting the City of New York a conditional right to divert water from non-navigable tributaries of the Delaware River to supplement New York's municipal water supply, Justice Holmes noted that "[a] river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."³⁹ The river had won recognition as a resource ripe for government exploitation. The issue that faced the nation was who would share in the benefits of potential hydroelectric power production.⁴⁰

Legal historians trace the origins of federal jurisdiction over both hydropower and water quality back to the Rivers and Harbors Act of

34. *Id.* at 190.

35. *Id.*

36. *See infra* Part II.

37. For a general discussion of the development of waterpower in the United States, see L. HUNTER, *WATERPOWER IN THE CENTURY OF THE STEAM ENGINE* (1979).

38. *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916).

39. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

40. America's call for hydroelectric power skyrocketed with the demand for aluminum, production of which is an electrolytic process requiring massive amounts of electricity. MARC REISNER, *CADILLAC DESERT* 168 (1986).

1884.⁴¹ The first federal navigation legislation required the Secretary of War to notify Congress of bridges or other structures that might interfere with navigation. It also prohibited the discharge of any material into navigable waters of the United States, except that flowing from streets and sewers.⁴² In 1890, the Act was reauthorized and modified to require Congress, and in some cases the Secretary of War, to grant prior approval for any proposal to install obstructions in navigable waters.⁴³ The legislature's decision to develop a permitting system for certain water uses gave the states and riparian water users notice of the federal government's interest in controlling local waterways.⁴⁴

In the early twentieth century, it became increasingly clear that the federal government's interest in controlling local water resource use was largely motivated by the growing value of water power. The Dam Act of 1906 restated the requirement of congressional consent for any project interfering with navigation.⁴⁵ It was also the first legislation wherein Congress established the federal government's right to impose conditions on waterway projects.⁴⁶ In 1908, President Theodore Roosevelt vetoed the Dam Act because of complications and delay in the development of one water power project.⁴⁷ The President foresaw the probability of conflicting demands for water resources when he called for improvement of the nation's waterways according to a "consistent unified plan."⁴⁸ The primary concern at the time was whether the federal government was entitled to the benefits of local water projects. Roosevelt's controversial suggestion was that the federal government should be granted the power to set water use charges "in order to allow the public a return on its resource, to fund further navigational improvements, and allow regulation of 'monopolistic' power interests."⁴⁹ The ensuing debate between

41. The Rivers and Harbors Act, 23 Stat. 133 (1884) (codified at 46 U.S.C. § 103). The Act came to be known as the Refuse Act because of its discharge prohibition. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 104, 874-876. However, the Act was not considered a pollution control law until the 1960s. *Id.* at 874.

42. See M. Curtis Whittaker, *The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities*, 10 HARV. ENVTL. L. REV. 135, 147 (1986); PERCIVAL, *supra* note 41, at 104.

43. The Rivers and Harbors Act, *supra* note 41.

44. Whittaker, *supra* note 42, at 147.

45. The Dam Act, Pub. L. No. 59-262, 34 Stat. 386 (codified as amended in section XX of U.S.C. (1905-1907)).

46. Whittaker, *supra* note 42, at 147. The Secretary of War and the Chief of Engineers had to approve specifications, plans, and locations of such facilities. *Id.*

47. *Id.* at 148 (citing 42 Cong. Rec. 4698 (1908) (letter from President Roosevelt)).

48. Whittaker, *supra* note 42, at 148.

49. *Id.*

conservationists and developers regarding the federal government's power to levy water use charges for the use of public resources laid the groundwork for the Federal Water Power Act (FWPA) of 1920.⁵⁰

B. The Federal Power Act: An Ideal of Split Jurisdiction Over Comprehensive Water Management and the Reality of Federal Power

Following President Roosevelt's suggestion, the FPA sought to establish a comprehensive plan for the management of hydroelectric facilities.⁵¹ Subchapter I of the Act provides that licensed projects

shall be . . . best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development . . . and for other beneficial public use, including irrigation, flood control, water supply, and recreational purposes.⁵²

The drafters recognized the imminent clashes between the federal search for water power and the states' interest in their water resources.⁵³ In light of these conflicting concerns, the FPA set out a regulatory balance of powers for the implementation of comprehensive planning policies.

The FPA empowers the federal government to promote private hydropower production through a licensing system. Section 4(e) authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction."⁵⁴ This licensing capacity enables the federal government to monitor and coordinate the

50. The FWPA was ultimately renamed the Federal Powers Act. Federal Power Act, 16 U.S.C. §§ 791-823 (1982) [hereafter FPA]. See Whittaker, *supra* note 42, at 149. Some conservative "state righters" opposed the notion that the federal government could levy water-use charges even to compensate the general public. They argued that absent an affirmative exercise of the commerce power, the federal interest in water regulation was restricted to the protection and enhancement of navigation. This argument was incompatible with the congressional urge to develop the nation's water power resources, and after the adoption of the Federal Water Powers Act, the anti-federalists were rebuffed by the Supreme Court. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), and *infra* notes 65 - 78 and accompanying text.

51. 16 U.S.C. § 803(a)(1) (1988).

52. *Id.*

53. See Whittaker, *supra* note 42, at 151.

54. 16 U.S.C. § 797(e) (1988).

development of hydroelectric facilities.⁵⁵ Applicants can receive preliminary permits which authorize them to study the technical and economic feasibility of a hydropower project and allow them priority in subsequent licensing proceedings.⁵⁶ Once a license is issued, it is good for up to fifty years.⁵⁷ The FPA also establishes procedures for disposition of the project at the finish of a license term.⁵⁸ These specific licensing procedures enable federal agencies to coordinate development of hydropower projects and allow prospective developers to plan based on certain conditions.

The FPA holds states responsible for regulating balanced use of their river resources. Two provisions of the Act, sections 9(b) and 27, are commonly cited as evidence that Congress intended to save, rather than preempt, state laws regarding water use: section 9(b) and section 27.⁵⁹ Section 9(b) requires license applicants to supply FERC with satisfactory evidence that the applicant has

complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.⁶⁰

The plain text of section 9(b) indicates that states are allowed first say on the matter of development on state waterways.⁶¹ Section 27 reaffirms this deference to state control through a similar savings clause:

55. Section 23(b) of the FPA states that [i]t shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands . . . of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this [Act].

16 U.S.C. § 817 (1988).

56. 16 U.S.C. § 798 (1988).

57. *Id.* at § 799.

58. *Id.* at § 808.

59. 16 U.S.C. §§ 802(b), 821. See Whittaker, *supra* note 42, at 152-53. See also Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 117 (1991) [hereinafter Blumm].

60. 16 U.S.C. § 802(b) (1988).

61. *Id.*

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.⁶²

The drafters of the FPA meant to protect states from unconditioned use of resources that were traditionally under state control. These provisions, when combined with the federal licensing powers, provide a comprehensive strategy for the management of potentially conflicting water uses.

For nearly a quarter century after the passage of the FPA, the Federal Power Commission (FPC) only issued federal licenses to those projects showing compliance with state laws.⁶³ However, the carefully crafted balance of regulatory power was not strong enough to endure the federally directed march toward vast industrialization during the New Deal.⁶⁴

In 1940, the Appalachian Electric Power Company (Appalachian) proposed to build a hydroelectric dam on a branch of the New River in Virginia.⁶⁵ Although the company did not believe that it was working on a navigable portion of the river, it submitted a license application to the FPC.⁶⁶ After reviewing two reports from the Chief of Engineers of the War Department that stated that the New River was not navigable at the point of construction, the FPC nevertheless required Appalachian to file for a license on the grounds that the project "would affect the interests of interstate . . . commerce."⁶⁷ When Appalachian chose to challenge this decision in court, both the United States District Court and the Court of Appeals ruled that the river was not navigable and that a license was not required.⁶⁸ On further appeal, the Supreme Court reversed, ruling that rivers do not have to be navigable in fact to be subject to Federal regulation under the Commerce Clause but need only be capable of navigation with reasonable improvements.⁶⁹ "A waterway, otherwise suitable for navigation, is not barred from that classification merely

62. *Id.* at § 821.

63. Blumm, *supra* note 59, at 118 (citing FEDERAL POWER COMMISSION, FIRST ANNUAL REPORT 27 (1921), H.R. DOC. NO. 242, 67th Cong., 2d Sess. 30 (1921); FEDERAL POWER COMMISSION, SECOND ANNUAL REPORT 225 (1922), H.R. DOC. NO. 473, 67th Cong., 3d Sess. 225 (1922)).

64. *Id.* at 118.

65. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 399 (1940).

66. *Id.* at 400.

67. *Id.*

68. *Id.* at 398.

69. *Id.* at 407.

because artificial aids must make the highway suitable for use before commercial navigation may be undertaken."⁷⁰ This interpretation of "navigable waters" vastly expanded the federal government's authority to regulate activities on intrastate waters.

The Supreme Court issued another declaration in the same case which may have had an even greater impact on the federal and state balance of power over water resources.⁷¹ Forty-one states joined as amici in support of Appalachian's claim that provisions of the FPC license which sought to control affairs of the licensee were unconstitutional since they were not directly related to navigation.⁷² Specifically, the states contended that the FPC's "claimed right to acquire this project and to regulate its financing, records and affairs, [was] an invasion of the rights of the states, contrary to the Tenth Amendment."⁷³ The State of Virginia was particularly concerned that expanding FPC authority would obstruct state control over intrastate river resources, so that such a project could not even be constructed without federal approval.⁷⁴ The Supreme Court responded to state concerns with a bold statement of federal power:

In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.⁷⁵

The Court's broad definition of navigability may have been necessary to uphold the federal government's recently established authority to license hydroelectric facilities.⁷⁶ However, the breadth and vagueness of its terms, incorporating "[f]lood protection" and "watershed development" in the realm of federal power, left little apparent room for state water management.⁷⁷ *Appalachian* distorted Marshall's formalistic distinction

70. *Id.*

71. *Id.* at 419-26.

72. *Id.* at 421.

73. *Id.*

74. *Id.* at 422-23.

75. *Id.* at 426.

76. See 16 U.S.C. § 797(e); *supra* note 54 and accompanying text.

77. 16 U.S.C. §§ 802(c), 821. See *supra* note 75 and accompanying text.

between federal regulation of navigation and state jurisdiction over health and safety.⁷⁸ As federal jurisdiction expanded, the FPA permitted mismanagement of water resources, since vested personal, local, and state interests became divorced from the decision-making processes.

II. THE ENVIRONMENTAL IMPLICATIONS OF IMBALANCED FEDERAL POWER

A. *The Environmental Impacts of Hydroelectric Power*

The environmental and social impacts of hydroelectric development stem from dam construction which obstructs and impounds free-flowing water.⁷⁹ The primary environmental concerns include streamflow maintenance for downstream ecosystems, preservation of critical flow-related conditions for anadromous and resident fish species (such as current velocity, temperature, depth and bottom material), and general effects on wildlife habitats, including potential flooding of upstream territories.⁸⁰ Of course, such repercussions will vary depending on the nature of the site and the project. The social consequences of hydropower projects include human displacement from the flooding of upstream land and depletion of downstream water supplies. Hydroelectric development often impairs alternative water uses, including recreational activities such as white-water boating and fishing.⁸¹

In light of these possible effects, the central policy question is the total cost, both economic and otherwise, of hydroelectric power.⁸² Those authorized to regulate hydropower projects should consider the cost to the environment and society as well as the expense of regulatory compliance for the developer and the benefits of the power source. Fifty years ago, the nation's growing need for power distorted the balance of the total cost equation. In 1946, the United States Supreme Court perpetuated that

78. See *supra* notes 34 - 35 and accompanying text.

79. John R. Ehrenfeld, *Hydropower in New England*, 5 VT. L. REV. 189 (1980). Construction of new hydropower facilities also raises problems for any development project including potential road building, increased traffic, noise, soil erosion and contamination from construction debris. *Id.*

80. *Id.* at 194-97. See generally F. Lorraine Bodi & Eric Erdheim, *Swimming Upstream: FERC's Failure to Protect Anadromous Fish*, 13 ECOLOGY L.Q. 7 (1986) (FERC's failure to protect anadromous fish); Michael C. Blumm, *A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing*, 10 HARV. ENVTL. L. REV. 1, 3 (1986) [hereafter Blumm Trilogy]; D.H. Cole, *Reviewing the Federal Power Act's Comprehensive Planning Requirement: A History of Neglect and Prospects for the Future*, 16 ENVTL. L. 639 (1986). FERC was 17 years late in promulgating regulations implementing NEPA. Blumm, *supra* note 59, at 115 n.8.

81. Ehrenfeld, *supra* note 79, at 196-98.

82. *Id.*

distortion by allowing the federal government unrestricted discretion to balance the costs and benefits of FPA permitting decisions.

B. First Iowa Hydro-Electric Cooperative v. Federal Power Commission: The Root of Imbalanced Hydroelectric Regulation

The most frequently cited and commonly lamented Supreme Court decision regarding regulation of hydroelectric projects is *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*.⁸³ In 1946, pursuant to section 23(b) of the FPA, First Iowa Hydro-Electric Cooperative submitted a license application to the FPC seeking permission to construct a dam on the Cedar River, a navigable waterway near Moscow, Iowa.⁸⁴ The proposal was to divert all but approximately twenty-five cubic feet per second of water from the Cedar River at Moscow about ten miles west to the Mississippi River at Muscatine.⁸⁵ The result, "the largest power development foreseeable on either the Cedar or Iowa Rivers," provided the project's "greatest economic justification."⁸⁶ However, Iowa state law required all projects proposed for state waters to obtain permits from the Executive Council of the State and conditioned permit issuance on evidence that "any water taken from the stream in connection with the project would be returned thereto at the nearest practicable place."⁸⁷ The State of Iowa requested that the FPC deny the Cedar River project license, because the ten mile diversion violated state law.⁸⁸ On review, the FPC dismissed the Cedar River project proposal without prejudice, stating that "the courts were the appropriate place for the decision on Iowa's contention as to the applicability and effectiveness of [state law] in relation to this project."⁸⁹ When the project's planners appealed the FPC decision, the Court of Appeals for the District of Columbia affirmed the denial of the license.⁹⁰ On second appeal, the

83. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1945).

84. *Id.* at 158 [hereinafter Cedar River Project]. See *supra* note 55.

85. *Id.* at 158. From Moscow, the Cedar River "flows southwesterly 29 miles to Columbus Junction where it joins the Iowa River and returns southeasterly 28 miles to the Mississippi. The proposed diversion . . . will correspondingly reduce the flow in the Iowa River while the diverted water will enter the Mississippi at Muscatine, about 20 miles above its present point of entry at the mouth of the Iowa River." *Id.*

86. *Id.* at 166 (citing a report from the Chief of Engineers at H.R. DOC. NO. 134, 71st Cong., 2d Sess., 86, 87, 90 (1929)).

87. *Id.* at 164, 166 (citing 363 IOWA CODE §§ 7767, 7771 (1939)).

88. *Id.* at 159, n.4.

89. *Id.* at 161-62.

90. *First Iowa Hydro-Electric Coop. v. United States*, 151 F.2d 20, 22 (D.C. Cir. 1945).

United States Supreme Court reversed the decision of the appellate division and upset the balance of federal and state regulatory power set out in the FPA.⁹¹

The Supreme Court made passing reference to state jurisdiction while emphasizing a new goal of exploiting water power resources.⁹² The *First Iowa* opinion notes that

when [the FPA] is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States.⁹³

One inherent problem of any regulatory balancing scheme is that it can easily become weighted in favor of the power that conducts the balance. The *First Iowa* ruling gave the scales to the federal government.

The Court decided that the FPC should have ruled on the Cedar River project application despite the state's attempt at intervention.⁹⁴ Under the Court's interpretation, the deference to state law set out at section 9(b) of the FPA was only meant to have procedural significance.⁹⁵ The Court held that once the FPC received information regarding a project's compliance with state law, the Commission could use such information in its determination of whether to grant a federal license "in so far as it deems it material."⁹⁶ In support of this ruling, the Court cited a statement by Representative Mondell:

There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that *the water-power commission shall have the benefit of all the information which the States possess relative to the condition of water supply at the point of proposed diversion . . . [and] the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provisions were in the bill or not.*⁹⁷

91. *First Iowa*, 328 U.S. at 152. See *supra* notes 51-53 and accompanying text.

92. *Id.* at 171.

93. *Id.*

94. *Id.* at 160.

95. *Id.* at 168-69.

96. *Id.* at 169.

97. *Id.* at 179 (citing 56 Cong. Rec. 9813-9814) (emphasis in original).

The Court clearly emphasized Mondell's first stated purpose while underestimating the significance of the second. The treatment of the FPA's savings clause as a mere procedural mechanism to enhance federal review effectively eliminated state power to influence federal permitting decisions.

Apparently uncomfortable with the implications of that interpretation, the Court sought to downplay the significance of section 9(b) by comparing it to section 27.⁹⁸ Since section 27 includes an explicit reservation of certain powers to the state, the Court concluded that it was more pertinent to the *First Iowa* decision than section 9(b), which does not include an explicit savings provision.⁹⁹ The Court adopted a formalistic mode of analysis to narrow the scope of state authority allowed under section 27 of the FPA.¹⁰⁰ That section protects state water law pertaining to "control, appropriation, use or distribution" from supersedure.¹⁰¹ The Supreme Court restricted state jurisdiction by ruling that section 27 only reserves regulation of proprietary rights to the states.¹⁰² The majority held that:

The effect of section 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights.¹⁰³

In support of this interpretation, the Court referred to the legislative history and a statement by Representative William L. LaFollette, a member of the Special Committee on Water Power, that "we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development."¹⁰⁴ The Court's interpretation of section 27 meant that Iowa could only restrict diversions of water from the Cedar River to protect proprietary rights. In 1946, there were no cities or towns on the Cedar River between Moscow and Columbus Junction, Iowa, so proprietary rights such as municipal or

98. *First Iowa*, 328 U.S. at 175.

99. *Id.*

100. *Id.* at 177.

101. 16 U.S.C. § 821.

102. *First Iowa*, 328 U.S. at 175-76.

103. *Id.*

104. *Id.* at 174 (citing 56 Cong. Rec. 9810) (emphasis omitted).

irrigational uses were not at stake in the case; thus, Iowa's regulatory power was foreclosed.¹⁰⁵

The declaration that section 9(b) of the FPA does not restrict the FPC's discretion to license hydroelectric facilities and the determination that the saving clause in section 27 only preserves state capacity to regulate proprietary rights effectively reversed the Supreme Court's prior finding in *Martin v. Waddell's Lessee*.¹⁰⁶ In 1946, the Court held that "in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."¹⁰⁷ In 1842, the same Court was not concerned with what Congress was willing to allow, since the American federalist tradition, as spelled out in the Tenth Amendment to the Constitution, required that those powers not delegated to the federal government are reserved to the states.¹⁰⁸ The majority in *First Iowa* allowed federal preemption of Iowa law because they opined that Congress had only granted states the authority to regulate for the protection of certain proprietary uses.¹⁰⁹ However, courts are meant to avoid statutory interpretations that invoke conflicts with the Constitution. The language of section 9(b) indicates that Congress did not intend for the states to have such a limited influence.¹¹⁰ Law professor and constitutional scholar Lawrence Tribe comments that any court that does not allow the full weight and effect of congressional statutes that preserve state authority is "pursuing a fundamentally lawless path."¹¹¹

In its conclusion, the majority opinion indicates that most of the nation, including some conservationists, hoped that the FPA would enact "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the nation."¹¹² By 1946, the nation's "complete scheme" had a new orientation: the goal of supplying power to support unprecedented industrialization. At the end of World War II, the Supreme Court was willing to allow the federal government new planning powers. The Court's finding that the FPC could better plan for hydroelectric development without having to contend with

105. *Id.* at 158.

106. *Martin v. Waddell's Lessee*, 41 U.S. 367, 411 (1842).

107. *First Iowa*, 328 U.S. at 176.

108. *Martin*, 41 U.S. at 410. See *supra* note 27 and accompanying text.

109. *First Iowa*, 328 U.S. at 175-76.

110. 16 U.S.C. § 802(b).

111. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 482, n.8 (1988).

112. *First Iowa*, 328 U.S. at 180. Some historians of water regulation discount this theory of the conservationists' objectives for the FPA. See CHARLES J. MEYERS & A. DAN TARLOCK, *WATER RESOURCE MANAGEMENT* 489-91 (1971).

conflicting state agendas is not strange when viewed in this historical perspective.¹¹³ Indeed, the *First Iowa* decision remained largely unchallenged until the 1970s, when the nation's search for renewable and sustainable energy sources made it clear that the "comprehensive" planning process pursued by the FPC and FERC is environmentally deficient.

C. The Energy Crisis and Reevaluation of Unmitigated Resource Depletion

In 1973, the Organization of Petroleum Exporting Countries (OPEC) imposed an embargo on oil exports to the United States, which caused a sharp increase in the price of fossil fuels.¹¹⁴ In response to the resulting energy crisis, the Carter administration acknowledged the nation's over-reliance on foreign oil supplies and introduced legislation that made the reduction of oil consumption a "national mania."¹¹⁵ Congress passed the Public Utility Regulatory Policies Act (PURPA) in 1978, amending the FPA to create incentives for domestic power production from renewable resources.¹¹⁶ As amended in 1982, PURPA requires that electric utilities offer to purchase energy produced by "qualifying facilities"¹¹⁷ at a rate not to exceed "the incremental cost to the electric utility of alternative electric energy."¹¹⁸ This guaranteed market for power ensures the economic vitality of small producers of hydroelectricity. PURPA also empowers FERC to facilitate licensing for small hydropower projects¹¹⁹ and exempts others from licensing altogether.¹²⁰ Finally, PURPA establishes financial

113. *First Iowa*, 328 U.S. at 181. See Blumm, *supra* note 59, at 119-120.

114. Wendy Fischer, *Small Hydroelectric Projects and State Water Rights*, 18 PAC. L.J. 1225, 1231 (1987).

115. Stephen H. Burke, *Small Scale Hydroelectric Development and Federal Energy Law: A Guide for the Private Developer*, 9 B.C. ENVTL. AFF. L. REV. 815 (1981).

116. Public Utility Regulatory Policies Act (PURPA), Pub. L. No. 95-619, 92 Stat. 3206 (1978) (codified in 50 U.S.C. §§ 7, 10, 12, 15, 16, 30, and 42). PURPA did not define "renewable resource," but the conference report designated water as a renewable resource. H.R. REP. NO. 1750, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S.C.C.A.N. 7797, 7823.

117. 16 U.S.C. § 796(17)(A). A "qualifying facility" is defined as a small power generator that produces no more than 80 megawatts of electric energy from biomass, waste, renewable resources, geothermal resources, or a combination thereof. *Id.* § 796(17)(A)(i)-(ii).

118. 16 U.S.C. § 824a-3(b). FERC regulations enacted under this provision require electric utilities to pay the "full avoided cost," meaning a rate equal to the marginal cost per kilowatt hour of the next best alternative power source (usually nuclear power or oil). 18 C.F.R. § 292.304.

119. 16 U.S.C. § 2705.

120. 16 U.S.C. § 823(a). PURPA exemptions apply to hydroelectric facilities that produce power by placing a turbine in an existing man-made water conveyance such as a pipe or a canal. In order to be exempt, the facility must have a maximum installed capacity of 15 megawatts or 40 megawatts if the conduit provides municipal water supply. *Id.*

incentives for the development of small hydroelectric facilities, including federal loans to defray the costs of feasibility studies, licensing, and in some cases, construction.¹²¹

In 1980, Congress amended the FPA again to extend the incentives for power production at small hydroelectric projects.¹²² The Energy Security Act amendments allowed greater eligibility for federal incentives by redefining "qualifying facilities" as those with an installed capacity of up to thirty megawatts¹²³ and by including those hydropower projects that use natural water features and do not need an impoundment structure.¹²⁴ Those qualifying facilities were allowed additional favorable tax treatment,¹²⁵ and FERC was authorized to grant exemptions from FPA licensing requirements to projects with an installed capacity of up to five megawatts.¹²⁶

Altogether, these amendments have been extremely effective at stimulating the development of new hydroelectric facilities. The total number of applications filed for preliminary permits, exemptions, and licenses increased from seventy-six in 1977 to 1,856 in 1981.¹²⁷ Since 1981, the numbers of applications and license issuances have fallen, but FERC still receives about 700 permit applications and licenses annually.¹²⁸ Both the legislature and FERC still make efforts to monitor and reduce the environmental repercussions of this outbreak of small hydroelectric projects.¹²⁹ However, some question the capacity of the federal

121. 16 U.S.C. §§ 2702-2703.

122. Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980) (codified as amended at 30 U.S.C. §§ 1511, 1516.)

123. 16 U.S.C. § 2708(a)(1).

124. 16 U.S.C. § 2708(b).

125. 16 U.S.C. § 2705(d). See generally Friedman & Meyer, *Energy Tax Credits in the Energy Tax Act of 1978 and the Crude Oil Windfall Profits Tax of 1980*, 17 HARV. L. REV. 465, 494 (1980).

126. 16 U.S.C. § 2705(d).

127. *Small Hydro Hearings*, supra note 7 (letter from Raymond O'Connor, Chairman of FERC, Sept. 11, 1984).

128. Whittaker, supra note 42, at 140. Federal legislation requires FERC to assess the environmental impact of hydroelectric facilities and to implement some resource protection measures under National Environmental Policy Act (42 U.S.C. §§ 4321-4361), the National Historic Preservation Act (16 U.S.C. § 470), and the Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1287). FERC also requires license applicants to submit environmental information. See FEDERAL ENERGY REGULATORY COMM'N, APPLICATION PROCEDURES FOR HYDROPOWER LICENSES, LICENSE AMENDMENT, EXEMPTION AND PRELIMINARY PERMITS (1985) (FERC-D100).

129. See generally Blumm Trilogly, supra note 80 (arguing that FERC is unable to cope with the flood of applications due to the structure of their bureaucracy, their small staff, and their copious procedures and that the plethora of lawsuits challenging FERC decisions is a good indication of public discontent). See also Peter Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002 (1987) (arguing that, because authority over electric power is fragmented among many isolated federal agencies and split with state regulators, FERC consequently fails to

government to manage a rash of new energy sources.¹³⁰ Others indicate that the sheer numbers of new dams conflict with a growing public interest in river recreation.¹³¹ The rapid increase of small hydroelectric facilities presents a new moving target for government regulation and raises state concerns that the federal government cannot effectively manage its regulatory burden. States therefore hope to retrieve some control over river management.¹³² The 1978 Supreme Court decision in *California v. United States*¹³³ gave their reason for hope. Twelve years later, the Court once again foreclosed state regulatory authority over hydroelectric licensing pursuant to the FPA.¹³⁴

D. *The California Saga: Open and Shut Cases for State Regulatory Power Under the FPA*

As the American frontier expanded toward the West and confronted situations of water scarcity, settlers found that the traditional system of riparian rights was not sufficient to ensure proper use of a precious commodity. A new structure of water rights arose in Western states.¹³⁵ Under the prior appropriation doctrine, those that first take water for beneficial uses have a protected claim against all later appropriators.¹³⁶ The prior appropriation system is the basis for the administration of water rights in seventeen Western states, including California.¹³⁷

address the issues of total supply and environmental burden).

130. See Plouffe, *supra* note 8, at 834 (arguing that improved water quality resulting from the CWA has enhanced conflicting demand for sport fishing and white water sports).

131. See Plouffe, *supra* note 8, at 834.

132. See generally Thomas B. Arnold, *Emerging Possibilities for State Control of Hydroelectric Development*, 13 ENVTL. L. REP. 10,135, 10,142 (1983) (States should assert their interests aggressively in the regulation and control of hydroelectric development.); Blumm Trilogy, *supra* note 80 (FERC's discretion to regulate hydroelectric facilities was restricted somewhat by recent case law, but legislative reform is still necessary); Plouffe, *supra* note 8, at 834 (Federal government's preemption power should be reexamined to allow for state comprehensive river plans); Roderick E. Walston, *California v. Federal Energy Regulatory Commission: New Roadblock to State Water Rights Administration*, 21 ENVTL. L. 89, 111 (1991) (calling for legislative intervention to reassert states' rights in light of recent failings of the Supreme Court).

133. *California v. United States*, 438 U.S. 645 (1978).

134. *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490 (1990) [hereinafter *Rock Creek*]. See *infra* Part II.D.

135. See 1 CLARK, *supra* note 21, § 19.2.

136. GOLDFARB, *supra* note 24, at 16.

137. *Id.* at 15.

1. *California v. United States*: A Case for State Power

In the Flood Control Act of 1944, Congress authorized the construction of the New Melones Dam as part of the massive California Central Valley Project.¹³⁸ As with all other federal reclamation projects, Congress directed that this dam be built by the United States Bureau of Reclamation (the Bureau) "pursuant to the Federal reclamation laws"¹³⁹ and, in particular, pursuant to the Reclamation Act of 1902.¹⁴⁰ Section 8 of that Act provides that

[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. . . . The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.¹⁴¹

California law requires that any person wishing to appropriate water in the state must apply for a permit from the State Water Resources Control Board (the Board).¹⁴² Such a permit shall only be issued if the Board "determines that unappropriated water is available and that the proposed use is 'reasonable,' 'beneficial' and best serves 'the public interest.'"¹⁴³

In the late 1970s, the Bureau applied to the Board for a permit to appropriate 2.4 million acre-feet of water for impoundment by the New Melones Dam.¹⁴⁴ The Board found that unappropriated water was available for the dam during certain times of the year and granted the

138. See Flood Control Construction Act, ch. 665, 58 Stat. 887, 890 (1944) (codified at 33 U.S.C. §§ 701, 708); Flood Control Act of 1962, 76 Stat. 1173, 1176, 1398 (1962) (codified at 33 U.S.C. 426). For discussion of this project, see REISNER, *supra* note 40, at 208-09.

139. Flood Control Act of 1962, 76 Stat. 1173, 1398 (1962).

140. Reclamation Act, ch. 1093, 32 Stat. 390 (codified at 43 U.S.C. 372 (1902))[hereinafter Reclamation Act].

141. Reclamation Act at § 8 (codified at 43 U.S.C. 372, 383).

142. *California v. United States*, 438 U.S. 645, 652 n.7 (1978) (citing Cal. Water Code Ann. §§ 1201, 1225 (West 1971)).

143. *Id.* (citing Cal. Water Code Ann. §§ 1240, 1255, 1375).

144. *Id.* at 647.

Bureau's permit with twenty-five conditions of dam operation.¹⁴⁵ One of the conditions ensured compliance with state law by prohibiting full impoundment until the Bureau was able to show firm commitments, or a specific plan, for the use of the water.¹⁴⁶ If the applicant had sufficient water to satisfy a beneficial use, California law required that additional water be reserved for other beneficial uses.¹⁴⁷ The federal government recognized that uncontested acceptance of such conditions would set a new precedent for the balance of state and federal power, so it chose to challenge those provisions in federal district court. The Bureau sought a declaratory judgment that the United States may impound whatever unappropriated water is necessary for a federal reclamation project despite state law.¹⁴⁸ The United States District Court for the Eastern District of California decided that "the United States must apply to the State for an appropriation permit, but that the State must issue the permit without condition if there is sufficient unappropriated water."¹⁴⁹ On appeal, the United States Court of Appeals for the Ninth Circuit affirmed.¹⁵⁰

In his majority opinion for the Supreme Court, Justice Rehnquist acknowledged a lack of precedent addressing section 8 of the Reclamation Act.¹⁵¹ He attributed that shortage to a spirit of "cooperative federalism" that guided the development of the Reclamation Act.¹⁵² In his view, "the Act merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended."¹⁵³ Nevertheless, the Court concluded that Congress did not intend to detract from California's authority to condition the allocation of unappropriated water to federal reclamation projects.¹⁵⁴ In support of this conclusion, the opinion outlined the history of irrigation and reclamation in the United States, tracing a "consistent thread of purposeful and continued deference to state water law by Congress."¹⁵⁵ The majority cited federal statutes that provided for the settlement of Western land and the utilization of discovered resources

145. *Id.* at 652.

146. *Id.*

147. *Id.* at 653.

148. *Id.* at 647.

149. *Id.*

150. *Id.*

151. *Id.* at 651.

152. *Id.* at 650.

153. *Id.* at 651.

154. *Id.* at 674.

155. *Id.* at 653.

while preserving the authority of local law.¹⁵⁶ The opinion also referred to the Desert Land Act of 1877, a law that "recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation."¹⁵⁷ The majority then traced the development of the Reclamation Act from 1888 to 1897, ending with a quote from the principal sponsor of the 1897 Act: "I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to regulate and control the management and the price of the water."¹⁵⁸ Justice Rehnquist commented that public policy also supported deference to state law, since varying climates and topographies would prompt states to design and modify appropriate conditions for water use.¹⁵⁹

At the outset of the twentieth century, most of the land that could be irrigated for profit by small, private enterprises or local communities had been exploited.¹⁶⁰ The Reclamation Act was developed to provide funding for larger projects to complete the reclamation of arid lands in the West.¹⁶¹ However, the Supreme Court found that federal authority was not meant to accompany the grant of federal moneys, since section 8 of the Act "clearly provided that state water law would control in the appropriation and later distribution of the water."¹⁶² Although earlier Supreme Court cases construing the Reclamation Act had questioned the states' authority to impose conditions on federal projects,¹⁶³ the majority dismissed this line of findings and stated that "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law."¹⁶⁴ According to

156. *Id.* at 656; *See also* *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 704 (1899).

157. *California v. United States*, 438 U.S. at 658. *See also* *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922) (holding that the Desert Land Act does not bind the states to any policy but recognizes and gives sanction to the state and local doctrine of appropriation).

158. *California v. United States*, 438 U.S. at 662 (citing 29 CONG. REC. 1952 (1897)).

159. *Id.* at 649.

160. *Id.*

161. *Id.*

162. *Id.* at 664.

163. *See, e.g.*, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 276 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963); *Arizona v. California*, 373 U.S. 546, 547 (1963).

164. *California*, 438 U.S. at 675.

Justice Rehnquist's opinion, any other interpretation of the Act would "trivialize the broad language and purpose of [section] 8."¹⁶⁵

States' rights activists and environmentalists were quick to relate section 8 of the Reclamation Act to section 27 of the FPA, in hopes that this sudden revival of state autonomy would compel the Supreme Court to overrule *First Iowa*.¹⁶⁶ Some hoped that the Court had restricted its broad interpretation of federal Commerce Clause power, reversing the trend towards expansive federal jurisdiction that had begun half a century earlier.¹⁶⁷ Increasing recognition of the changing conditions on America's rivers and the environmental shortcomings of FERC's comprehensive planning led some to suspect that, when given the opportunity, the Supreme Court would reassert states' rights to condition federal licenses for the development and operation of private hydropower projects.¹⁶⁸ In 1990, the Supreme Court agreed to review the bounds of state regulatory authority again when the California Water Resources Control Board required more stringent minimum stream flow levels than FERC had established for a hydroelectric facility on Rock Creek.¹⁶⁹ The subsequent decision in *California v. Federal Energy Regulatory Commission* represents the final test of state power under the FPA alone.

2. *California v. Federal Energy Regulatory Commission* (*Rock Creek*): Case Closed for State Regulation Under the FPA

When the *Rock Creek* case arose for Supreme Court review, California argued that the savings clause at section 27 of the FPA was derived from section 8 of the Reclamation Act and that *First Iowa*'s characterization of the FPA could not stand in the wake of *California v. United States*.¹⁷⁰ The legislative history of section 27 supports a similar reading of the two savings clauses, since the author of section 27 recorded that the FPA provision was "substantially the same as section 8 of the reclamation law."¹⁷¹ The Court in *First Iowa* also acknowledged the similarity of the two savings provisions.¹⁷²

165. *Id.*

166. Walston, *supra* note 132, at 90-91; Whittaker, *supra* note 42, at 169.

167. Whittaker, *supra* note 42, at 169. See *supra* notes 20 - 113 and accompanying text.

168. Walston, *supra* note 132, at 90.

169. *Rock Creek*, 495 U.S. at 493-94.

170. *Id.* at 503. See *supra*, notes 83 - 113 and accompanying text.

171. Walston, *supra* note 132, at 97 n.26 (citing 51 CONG. REC. 13631 (1914) (remarks of Representative Taylor of Colorado)).

172. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 176 (1946).

In *Rock Creek*, Justice O'Connor's opinion for the unanimous Supreme Court admits that the perception of the states' regulatory powers in *California v. United States* fosters some "tension with [the interpretation of state regulatory power] set forth in *First Iowa*."¹⁷³ Nevertheless, the Court in *Rock Creek* downplayed the significance of this apparent contradiction by reading each of the two savings provisions in its separate statutory context and concluding that "the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act."¹⁷⁴ The opinion supported this conclusion through unelaborated citations to various statutes and to *First Iowa*.¹⁷⁵ The Court did not question the validity of its interpretation of the FPA in *First Iowa*.¹⁷⁶

The *Rock Creek* opinion also suggested that section 8 of the Reclamation Act only saves state laws related to water used in irrigation.¹⁷⁷ Consequently, the Court reasoned that its reading of section 8 in *California v. United States* was consistent with its interpretation of section 27 of the FPA in *First Iowa*, because both sections protect state laws regarding proprietary rights.¹⁷⁸ In *Rock Creek*, the majority determined that the California Water Resources Control Board was trying to expand section 27 of the FPA to allow state-imposed regulation of minimum stream flow.¹⁷⁹ Because the *First Iowa* Court determined that Iowa's requirement that projects minimize stream diversion was not related to any proprietary

173. *Rock Creek*, 495 U.S. at 503-04.

174. *Id.* at 504. Soon after the *Rock Creek* ruling, the State of Vermont brought two cases in federal court, challenging FERC's exclusive authority over the construction and operation of a hydroelectric project near Springfield, on the Black River [the Black River project]. See *Springfield v. Vermont Envtl. Bd.*, 521 F. Supp. 243 (D. Vt. 1981) [hereinafter *VEB*] and *Springfield v. McCarren*, 549 F. Supp. 1134 (D. Vt. 1982) [hereinafter *McCarren*]. In 1981, the district court rejected the Vermont Environmental Board's claim that the FPA only preempts states from regulating construction and operation of a hydroelectric facility and permits state law to control project aspects such as road relocations and recreational improvements. *VEB*, 521 F. Supp. at 249. That court held that the FPA "reflect[s] a clear Congressional intent to bring all aspects of the hydroelectric project within the purview of the federal regulatory scheme." *Id.* at 249. In 1982, the same court held that the Vermont Public Service Board [hereinafter *VPSB*] did not have jurisdiction to require the Black River project to obtain a certificate of public good prior to operation. *McCarren*, 549 F. Supp. at 1154. That decision denied *VPSB*'s claim that the *California v. United States* decision had overruled *First Iowa*, because the court found that the regulatory structure of the Reclamation Act is distinct from that of the FPA. *Id.* These decisions may have influenced the *Rock Creek* Court and FERC's decision to challenge the *Jefferson PUD* decision in Vermont. See *infra* notes 319 - 403 and accompanying text.

175. *Rock Creek*, 495 U.S. at 504.

176. See *supra* notes 83 - 113 and accompanying text.

177. *Rock Creek*, 495 U.S. at 504.

178. *Id.* See *supra* notes 83 - 134 and accompanying text.

179. *Rock Creek*, 495 U.S. at 506-07.

interests, the *Rock Creek* opinion assumed *ipso facto* that all state regulation of stream flow characteristics is subject to federal preemption.¹⁸⁰ The Court's assumption disregards the discrepant proprietary impacts of a 1946 dam in rural Iowa and a 1990 dam in developed California.

The Supreme Court decision in *California v. United States* was not confined to state regulation of proprietary rights, however.¹⁸¹ In the 1978 decision, the Court rejected the United States' "proprietary rights" argument and concluded that section 8 of the Reclamation Act "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'"¹⁸² California imposed one condition on the Bureau's operation of the New Melones Project relating to proprietary rights; the remaining conditions required beneficial use in order "to protect downstream water quality, fish and wildlife."¹⁸³ Therefore, the *Rock Creek* Court underestimated the breadth of its own prior decision.¹⁸⁴ Under section 8 of the Reclamation Act, which only refers to protection of state laws regarding "irrigation," the Court had allowed California to make any water management decisions that were not inconsistent with "clear congressional directives."¹⁸⁵ Although section 27 of the FPA requires deference to state laws regarding irrigation, municipal use, or other uses,¹⁸⁶ the *Rock Creek* Court ruled that the FPA only protects state power to regulate proprietary rights.¹⁸⁷ The *Rock Creek* Court thus applied a narrower construction of a broader savings provision.¹⁸⁸

When the *Rock Creek* Court distinguished section 8 of the Reclamation Act from section 27 of the FPA, it determined that Justice Rehnquist's notion of "cooperative federalism" did not apply to the regulation of private hydropower projects.¹⁸⁹ By contrast, the Court interpreted the FPA as a hostile federal invasion, a preemptive strike on

180. *Id.* at 505. See *supra* notes 83 - 105 and accompanying text.

181. Whitaker, *supra* note 42, at 140.

182. *California v. United States*, 438 U.S. 645, 675 (1977).

183. Walston, *supra* note 132, at 100.

184. *Id.* at 101.

185. *Id.* Contrast this interpretation of state regulatory power with the statement in *First Iowa* that "in those fields where rights are not thus 'saved' to the States, Congress is willing to let the superseding of the state laws by federal legislation take its natural course." *First Iowa*, 328 U.S. at 176. See *supra* notes 102 - 105 and accompanying text.

186. 16 U.S.C. § 821. See *supra* note 62 and accompanying text.

187. *Rock Creek*, 495 U.S. at 502-03.

188. *Id.* at 503.

189. *Rock Creek*, 495 U.S. at 503-05.

state regulatory authority.¹⁹⁰ Section 4(e) of the FPA authorizes FERC to issue licenses for hydroelectric projects on streams over which Congress has jurisdiction,¹⁹¹ and section 10(a) allows the agency to set conditions that it "deems best suited for power development and other public uses of the waters."¹⁹² Subsequent amendments under the Electric Consumers Protection Act of 1986 direct FERC to consider a project's effect on fish and wildlife as well as its power and development purposes.¹⁹³ The *Rock Creek* Court found that such a broad authorization of federal power left little room for state regulatory authority.¹⁹⁴

According to one commentator, the Reclamation and Federal Power Acts demonstrate Congressional "intent that state water laws would apply equally in both contexts," so there is little difference between the federal preemptive power in each Act.¹⁹⁵ Ultimately, the preemption question depends on Congressional intent.¹⁹⁶ The *Rock Creek* Court refused California's request to engage in a comprehensive analysis of the legislative intent behind section 27 of the FPA.¹⁹⁷

The majority opinion indicates that the Court was not entirely comfortable with this resolution of conflict between the federal and state governments.¹⁹⁸ Justice O'Connor confessed that California's argument regarding the savings clause in section 27 "could be said to present a close question" and would be in accord with "with the assumption that the

190. *Id.* at 496.

191. 16 U.S.C. § 797(e). See *supra* note 54 and accompanying text.

192. 16 U.S.C. § 803(a).

193. 16 U.S.C. § 797(e). Cf. 16 U.S.C. § 803(a)(1).

194. *Rock Creek*, 495 U.S. at 506.

195. Walston, *supra* note 132, at 98.

196. *Id.* See Whittaker, *supra* note 42, at 169-77, for a discussion of preemption and the *Rock Creek* case. Courts use two tests to determine Congressional intent: field and conflict preemption analysis. *Id.* at 170. Field preemption occurs when Congress has regulated the subject in such a way that it has occupied the field; when the "scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983). Courts also allow field preemption when they can infer Congressional intent to preempt from the nature of the affected subject matter. Whittaker, *supra* note 42, at 171 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 214, 218 (1947)). Conflict preemption applies to a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Whittaker argues that preemption was found in *First Iowa* only because the state sought to "directly regulate design and operation aspects of the federally licensed dam." Whittaker, *supra* note 42, at 175. In the *Rock Creek* case, California sought to regulate water usage and such state regulatory activity is not preempted according to the *First Iowa* analysis. *Id.*

197. *Rock Creek*, 495 U.S. at 505-06.

198. *Id.* at 497.

historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹⁹⁹ Nevertheless, the Court ultimately fell back on *stare decisis*, relying on *First Iowa* for support of its ruling.²⁰⁰

In light of the degree to which the unanimous opinion relied on *stare decisis* from *First Iowa*, it is curious that the Supreme Court decided to review the *Rock Creek* case. The reliance interests of licensees and other participants in the regulatory process compelled the majority to overlook factual differences between the two cases and changing conditions on America's rivers.²⁰¹ After *Rock Creek*, states could regulate federal reclamation projects but could not condition the operation of private hydropower facilities on adjacent land.²⁰²

3. The Failings of FERC's Adjudicatory Licensing Proceedings

FERC regulates hydropower development by adjudication,²⁰³ and the adjudicatory process is suited for resolving conflicts among individual rights.²⁰⁴ The FPA gives FERC “an effective means of deciding between competing applications,” but it does not provide the Commission with enough information to consider the wider implications of those resolutions.²⁰⁵ In order to provide for the broader public good, Congress incorporated the “comprehensive plan” requirement in section 803(a)(1) of the FPA.²⁰⁶ Unfortunately, FERC has not seen this provision as a manifestation of public interest.²⁰⁷ The Commission has commented that “the record should provide pertinent information on all beneficial public uses and thus contain the information that would constitute elements of a comprehensive plan.”²⁰⁸ One commentator complains that FERC has not satisfied its planning mandate.²⁰⁹

199. *Id.* (citing *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989)).

200. *Id.* at 497-503.

201. *Id.* at 500.

202. Walston, *supra* note 132, at 110.

203. Cole, *supra* note 80, at 643.

204. *Id.* at 643 n.10.

205. *Id.* at 644. Members of the public can intervene in FERC proceedings or comment on license applications, but evidentiary hearings are held in Washington, D.C., and interveners must be able to afford judicial review if they receive an adverse agency order. Moreover, those public interests that are not represented by “interested parties” have no voice in FERC proceedings. *Id.*

206. 16 U.S.C. § 803(a)(1). See *supra* note 51 and accompanying text.

207. Cole, *supra* note 80, at 644.

208. *Id.* at 644 n.20 (citing *Small Hydro Hearings*, *supra* note 7, at 39).

209. Cole, *supra* note 80, at 643.

Problems with the regulatory procedure for hydropower development compelled the House Subcommittee on Energy Conservation and Power to hold hearings on September 11, 1984.²¹⁰ The proceedings elicited testimony from states, developers, environmental groups and interested federal agencies and produced several criticisms of FERC's licensing procedures.²¹¹ The states complained that FERC's procedures impaired state law by interfering with their water law systems (including minimum streamflow requirements), their land use laws, and their comprehensive power-planning policies.²¹² Hearing participants criticized FERC's unwillingness to cooperate with states and other regulatory agencies and cited the Commission's failure to allow sufficient public participation in its decision-making process.²¹³ Finally, they questioned the ability of FERC's small staff to adequately manage growing numbers of hydropower applications.²¹⁴ This concern was shared by developers, who cited slow review procedures.²¹⁵

One critic contends that FERC's case-specific licensing decisions fail to balance the full range of values for America's rivers and thereby facilitate favoritism for power resources.²¹⁶ Another commentator notes that the Commission's refusal to accept hydroelectric development plans prepared by states and other federal agencies renders it dependent on information provided by project applicants and results in biased decision-making and haphazard planning policies.²¹⁷ Confronted by the Supreme Court's interpretation of the FPA, and by FERC's poor planning policies, states have turned to the Clean Water Act as a last resort to protect water resources.

210. *Id.* (citing *Small Hydro Hearings*, *supra* note 7).

211. Whittaker, *supra* note 42, at 143.

212. *Id.* at 142 (citing *Small Hydro Hearings*, *supra* note 7, at 772-83).

213. *Id.*

214. *Id.* at 143 (citing *Small Hydro Hearings*, *supra* note 7, at 411-12).

215. *Id.* (citing *Small Hydro Hearings*, *supra* note 7, at 444, 547).

216. Plouffe, *supra* note 8, at 845.

217. Cole, *supra* note 80, at 645. Cole notes that Congress created the Northwest Power Planning Council (NWPPC) in 1980 (Northwest Power Act, 16 U.S.C. § 839(b)) and directed FERC to consider the Council's plan "at each relevant stage of decision-making processes to the fullest extent practicable." Cole, *supra* note 80, at 645 n.21 (citing 16 U.S.C. § 839(b)(h)(11)(A)(ii)). Yet, FERC claims that the NWPPC program is only advisory and implementation of the Council's plan has been "virtually non-existent." *Id.*

III. THE CLEAN WATER ACT: STATE AUTHORITY TO REGULATE HYDROELECTRIC DEVELOPMENT FOR WATER QUALITY

Since 1990, states have pursued a new means to challenge FERC's regulatory authority over hydropower projects. In 1972, Congress passed the Clean Water Act (CWA),²¹⁸ a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."²¹⁹ Section 401 of the CWA requires states to provide a water quality certification before a federal license or permit can be issued.²²⁰ The legislative history for section 401 states that "the purpose of the certification mechanism provided in this law is to assure that federal licensing or permitting agencies cannot override State water quality requirements."²²¹ Section 401(a)(1) provides that

[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act.²²²

Section 401(d) further requires that

[a]ny certification provided under this section shall set forth any effluent limitation and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under sections 301

218. The Federal Water Pollution Prevention and Control Act (as amended), 33 U.S.C. §§ 1251 - 1387 (1988).

219. 33 U.S.C. §§ 1251(a), 1251(a)(2). Like all other federal environmental regulations, the CWA is an exercise of federal regulatory power authorized under the expanded Commerce Clause of the United States Constitution. The Act also resembles other federal environmental initiatives because its regulatory structure generally allows states to regulate for the attainment of federal standards. See PERCIVAL, *supra* note 41, at 118-120. Section 303 of the CWA is typical in this regard, requiring each state to institute comprehensive water quality standards for all intrastate waters, consisting of "the designated uses of the navigable waters involved and the water quality criteria for such water based upon such uses." 33 U.S.C. § 1313(c)(2).

220. 33 U.S.C. § 1341(a).

221. 1972 U.S.C.C.A.N. 3668.

222. 33 U.S.C. § 1341(a)(1).

or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.²²³

These provisions change the scope of state regulatory authority over private hydroelectric projects despite the Supreme Court's declaration of FERC's preemptive authority under the FPA.²²⁴

FERC has repeatedly recognized that it does not have jurisdiction to review states' decisions to deny or grant a water quality certification according to CWA section 401.²²⁵ FERC has indicated that it would accept a state certification that imposed stricter standards than those required by the agency.²²⁶ The Commission has held "that due to the 'mandatory nature' of section 401(d), federal licensing conditions must yield to the state-imposed conditions" even though the Commission "may 'express its disagreement with the conditions and may even refuse to issue the license because of such conditions.'"²²⁷ FERC has allowed states to impose conditions that are unrelated to water quality and has determined that only state courts may review the appropriateness of section 303 water quality criteria.²²⁸ FERC's reading of state regulatory power under the CWA quelled many potential conflicts between federal and state authority to regulate hydroelectric facilities according to the FPA and CWA. Nevertheless, state courts are split on the question of whether states can set 401 certification conditions on the issuance of federal licenses to private hydropower projects. Now FERC has reversed its own policy of deferring to 401 certifications.²²⁹

223. *Id.* at § 1341(d).

224. *Rock Creek*, 495 U.S. at 497-503. See *supra* notes 181 - 202 and accompanying text.

225. Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L. J. 43, 92 (1992) (citing Russo, 31 Fed. Energy Reg. Comm'n Rep. (CCH) 61,111, 61,228 (May 3, 1985); Griswold Textile Print, Inc., 30 Fed. Energy Reg. Comm'n Rep. (CCH) 61,240, 61,478 (March 8, 1985); Allegheny Elec. Coop., 51 Fed. Energy Reg. Comm'n Rep. (CCH) 61,268, 61,846 n.169 (June 5, 1990)).

226. Bogardus, *supra* note 225, at 93.

227. *Id.*

228. *Id.* at 92 (citing Central Maine Power Co., 52 Fed. Energy Reg. Comm'n Rep. (CCH) 61,033, 61,172-73 (July 12, 1990)).

229. *Compare* Power Authority of the State of New York v. Williams, 457 N.E.2d 726 (N.Y. 1983) with Georgia-Pacific Corp. v. Department of Env'tl. Conservation, 628 A.2d 944 (Vt. 1992) (table, on file with author) (holding that the CWA authorizes Vermont to incorporate continual spillage conditions in a section 401 water quality certification in order to maintain aesthetic and recreational conditions) and Washington Dep't of Ecology v. Jefferson PUD No.1 of Jefferson County, 849 P.2d 646 (Wash. 1993).

A. *New York's Refutation of the Section 401 Certification*

In 1977, the Power Authority of the State of New York (PASNY) proposed to build a pumped storage hydropower facility in the Catskill Mountains near Prattsville, New York [hereinafter the Prattsville Project].²³⁰ PASNY filed a license application with FERC and also applied to the State Department of Environmental Conservation (NYDEC) for certification under section 401 of the CWA.²³¹ NYDEC refused to grant certification on the grounds that the project failed to demonstrate that relevant water quality standards would be met, and would not grant a license until the project received 401 certification. PASNY appealed to the courts.²³² New York's Appellate Division annulled NYDEC's determination and remitted the matter to FERC for further proceedings.²³³

NYDEC appealed the appellate division's ruling to New York's Court of Appeals.²³⁴ The majority affirmed the lower court's decision.²³⁵ In a short opinion, New York's highest court noted that NYDEC only considered water quality standards in its decision to deny certification and had not honored the fact that the Prattsville Project was the only proposed project that could satisfy the state's energy needs as outlined in New York's energy master plan.²³⁶ The court noted that the CWA only gives the commissioner of NYDEC authority to evaluate whether there is "reasonable assurance" that the project "will not violate applicable water quality standards," whereas the FPA authorizes FERC to conduct a more comprehensive analysis, balancing all the costs and benefits of the project.²³⁷ New York's Court of Appeals effectively allowed the federal agency exclusive authority over hydroelectric projects by reading all of the substantive power out of section 401 of the CWA, rendering it a mere procedural evaluation.²³⁸ This reading of section 401 is inconsistent with FERC's prior interpretations of state 401 certification authority, and it raises a presumption regarding FPA preemption of the CWA that has not held up in other courts.²³⁹

230. *Power Authority of the State of New York v. Williams*, 457 N.E.2d 726, 727 (N.Y. 1983).

231. *Id.* 33 U.S.C. §§ 1341(a)(1), (d).

232. *State of New York v. Williams*, 457 N.E.2d 726, 727-28 (N.Y. 1983).

233. *Id.* at 728.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 730.

238. *Id.* This interpretation of the CWA is reminiscent of the *First Iowa* Court's reading of section 9(b) of the FPA. See *supra* note 95.

239. See *infra* notes 240 - 318 and accompanying text.

B. *Jefferson PUD Develops: Washington State Upholds
Section 401 Certification Authority*

In 1982, the City of Tacoma, Washington, and the Jefferson County Public Utility District 1 (Tacoma) proposed to build a hydropower plant on the Dosewallips River near the Elkhorn campground (the Elkhorn project).²⁴⁰ Before applying for a FERC license, Tacoma applied to the Washington Department of Ecology (WDOE) for 401 certification.²⁴¹ Washington's state water quality standards were established "consistent with public health and public enjoyment thereof, and the propagation of fish, shellfish and wildlife."²⁴² The standards also include an anti-degradation policy for state waters, that "no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed."²⁴³ The Dosewallips River is classified as a "Class AA" river²⁴⁴ and the characteristics of such rivers include "fish migration, rearing, spawning, and harvesting."²⁴⁵ According to these criteria, WDOE conditioned the issuance of a federal license to the Elkhorn Project on the maintenance of a minimum stream flow of between 100 cfs and 200 cfs.²⁴⁶ After conducting a two year study of the potential effects of the Elkhorn Project on fish habitat in the Dosewallips River, Tacoma had proposed to maintain minimum instream flows of between 65 cfs and 155 cfs depending on the month.²⁴⁷ Rather than complying with WDOE's higher standards, Tacoma took action in the courts.²⁴⁸ When the trial court upheld WDOE's streamflow rates, the Supreme Court of Washington granted Tacoma's petition for review.²⁴⁹

240. *State Dep't of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646, 648 (Wash. 1993).

241. *Id.* at 648-49.

242. *Id.* at 650 (emphasis deleted).

243. *Id.* at 650. A 1987 amendment to the CWA requires states to include an anti-degradation policy in water quality standards to ensure that "existing instream water uses and the level of water quality necessary to protect those uses are maintained and protected." 33 U.S.C. § 1313 (d)(4)(B).

244. *Jefferson PUD*, 849 P.2d at 650. This class of water is considered "extraordinary" such that "water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses." *Id.*

245. *Id.*

246. *Id.* at 649.

247. *Id.* Tacoma's studies were conducted in consultation with Ecology and other state agencies, including the Washington State Department of Fisheries and Wildlife, as well as the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council. *Id.*

248. *Id.*

249. *Id.*

The state supreme court recognized two issues for review: 1) whether the CWA authorized WDOE to include base flow requirements in its section 401 certificate for the Elkhorn Project and 2) whether the FPA preempts WDOE's action.²⁵⁰ On the first question, the court held that the streamflow conditions WDOE included in the 401 certification for the Elkhorn Project were appropriate to assure compliance with Washington's water quality standards.²⁵¹ Fisheries biologists from WDOE had determined that the instream flow urged by Tacoma risked degradation of the Dosewallip River's fish habitat and spawning conditions such that 401 certification could not be granted without more protective instream flow conditions.²⁵² The court dismissed Tacoma's argument that water quality criteria must be based solely on chemical conditions and numerical standards.²⁵³ It held that the CWA provides a broad definition of "pollution" and that protection of water quality involves more than mere maintenance of chemical integrity.²⁵⁴ Finally, the court cited the language of section 401(d), which requires a showing of compliance with "any other appropriate requirements of State law" in the state certification.²⁵⁵ The court noted that Washington law requires "perennial rivers and streams of the state [to] be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."²⁵⁶ Pursuant to this requirement, the court upheld WDOE's minimum streamflow requirements.²⁵⁷

Washington's Supreme Court then rejected Tacoma's argument that the FPA preempted WDOE's role under section 401 of the CWA on two grounds.²⁵⁸ The court found that WDOE's 401 certification was not a state action and that, even if it had been, federal law does not preempt CWA certifications.²⁵⁹ Since WDOE issues 401 certifications pursuant to a mandate of the federal CWA and conditions of such certifications become part of FERC's federal license, the court held that 401 certifications are not state action and cannot be preempted by federal law.²⁶⁰ Although the streamflow limitations were partially prompted by state law, the United States EPA had

250. *Id.* at 649, 653.

251. *Id.*

252. *Id.* at 650.

253. *Id.* at 653.

254. *Id.* at 650.

255. *Id.* at 653.

256. *Id.* at 652.

257. *Id.* at 653.

258. *Id.* at 653-57.

259. *Id.* at 654.

260. *Id.*

approved them, and the court believed that the federal government had a pervasive influence over WDOE's administration of the CWA.²⁶¹

Even if the threshold requirement of state action had been met, the court held that there were no grounds for a finding of preemption.²⁶² The 1986 amendments to section 803(j)(1) of the FPA authorize FERC to reject "the recommendations of state or federal fish and wildlife agencies," provided that the Commission publishes the reason for doing so and ensures "that its own conditions will comply with the FPA's standards regarding fish and wildlife protection."²⁶³ However, the court concluded that section 803(j)(1) does not apply to state certifications issued by WDOE pursuant to section 401 of the CWA.²⁶⁴ In fact, the court stated that "[t]he comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority."²⁶⁵

In addition, the Supreme Court of Washington found no grounds for conflict preemption in the regulation of the Elkhorn Project.²⁶⁶ Since concurrent compliance with WDOE's streamflow condition and the FPA was feasible, the court stated that fulfillment of the state requirement "[did] not stand as an obstacle to the accomplishment and execution of Congress' purposes."²⁶⁷ Tacoma relied on the United States Supreme Court decision in *Rock Creek* for a substantiation of its charge that compliance with both state and federal requirements was impossible.²⁶⁸ However, the Washington Supreme Court cited two distinctions between the cases.²⁶⁹ "First, in [*Rock Creek*], there was an actual conflict between the federal and state governments," because "FERC and the California [Water Resources Control Board] had issued conflicting streamflow [requirements]."²⁷⁰ In contrast, Tacoma had yet to apply to FERC for a license so such a conflict did not exist in *Jefferson PUD*.²⁷¹ Second, and more importantly, the CWA was not mentioned in the *Rock Creek* case.²⁷²

When Washington's Supreme Court upheld WDOE's authority to impose minimum streamflow requirements on the Elkhorn Project, Tacoma appealed

261. *Id.*

262. *Id.* See *supra* note 202 for a discussion of the preemption doctrine.

263. *Id.* at 655.

264. *Id.* at 656-57.

265. *Id.* at 655.

266. *Id.*

267. *Id.* at 655-56.

268. *Id.* at 656.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

to the United States Supreme Court. Once again, the nation's highest court accepted the opportunity to rule on whether states could exert authority over federal licensing procedures for hydroelectric projects. This time, however, the Court was asked to balance its reading of the FPA with conflicting state interpretations of the CWA. The result represents a victory for states' rights in the regulation of water quality, but the extent of state authority to interfere with FERC licensing decisions remains undetermined.²⁷³

C. Jefferson PUD in the United States Supreme Court: A Move to Restore Balance in Hydroelectric Regulation

On May 31, 1994, the United States Supreme Court took a big step toward resolving the issue of whether states can set conditions on federal licenses for hydroelectric facilities.²⁷⁴ The majority gave more strength to the CWA than some environmentalists had expected.²⁷⁵ However, the opinion carefully avoids the tension between the provisions of the CWA and the Court's traditional interpretations of the FPA.²⁷⁶ Consequently, it still is uncertain how the nation will balance its interest in hydropower development with the preservation of river resources.

The Court majority affirmed the Washington Supreme Court's reading of the section 303 water quality standards and the section 401 certification process, and attempted to resolve conflicting interpretations of those sections.²⁷⁷ Tacoma's first claim was that section 401(a) applies only to activities resulting in "any discharge into the navigable waters"²⁷⁸ and does not authorize the state to set minimum streamflow requirements.²⁷⁹ The Court responded by citing language from section 401(d) that requires all "applicants" to comply with the Act and appropriate state law.²⁸⁰ According to the majority, facilities are only compelled to apply for 401 certification when they discharge into navigable waters pursuant to subsection (a), but once that prerequisite is satisfied, the state can impose on an applicant any conditions that are necessary to serve the purposes of the CWA and state law

273. *Jefferson PUD*, 114 S. Ct. 1900 (1994). See *infra* notes 274 - 318 and accompanying text.

274. *Jefferson PUD*, 114 S. Ct. at 1900.

275. Blumm, *supra* note 59, at 115 n.9. The author states that section 401 only authorizes states to set minimum flows for the purpose of attaining water quality, not for the protection of fish and wildlife. For discussion of the *Jefferson PUD* Court's treatment of this interpretation, see *infra* notes 277 - 297 and accompanying text.

276. See *infra* note 306 and accompanying text.

277. *Jefferson PUD*, 114 S. Ct. at 1908-15.

278. See 33 U.S.C. § 1341(a).

279. *Jefferson PUD*, 114 S. Ct. at 1908.

280. *Id.* at 1909 (citing 33 U.S.C. §§ 1341(d)).

under subsection (d).²⁸¹ Although the dissent claimed that this interpretation renders subsection (a) obsolete, the majority granted deference to EPA regulations that support the application of 401 conditions to all activities that threaten the attainment of water quality standards.²⁸² Since WDOE's minimum streamflow requirements were set to ensure compliance with state water quality standards, the Court upheld those conditions pursuant to section 401.²⁸³ This ruling contravened the holding of the New York Court of Appeals in *State of New York v. Williams*.²⁸⁴

Having found that "States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law,'" the Court considered whether WDOE's minimum streamflow requirement was a proper condition.²⁸⁵ Tacoma argued that section 303 only authorizes states to develop specific, numerical water quality "criteria" and does not allow WDOE to regulate for the protection of a designated "use."²⁸⁶ The petitioners alleged that if states are allowed to establish general standards focused on preserving various uses, their power to determine appropriate uses of their waterways will be unbounded, and numerical criteria will become obsolete.²⁸⁷ In response, the Court noted that water quality criteria are an important means of achieving the levels of water cleanliness necessary to support desired uses.²⁸⁸ Section 303 requires that projects operate according to both water quality criteria and the maintenance of designated uses.²⁸⁹ This reading is consistent with EPA regulations that define criteria as "elements of state water quality standards expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use."²⁹⁰ The Court noted that states would be forced to expend extensive resources to equate concentrations of various chemicals and qualities with the sustenance of particular uses if required to regulate solely according to specific numerical

281. *Id.*

282. *Id.* (citing 40 CFR § 121.2(a)(3) (1992)).

283. *Id.* at 1910. Although section 303, the requirement for state water quality standards, is not referenced on the list of parallel provisions in section 401(d), the Court found that the state standards are implicitly cross-referenced through section 301 which is listed. *Id.*

284. *See supra* notes 230 - 239 and accompanying text.

285. *Jefferson PUD*, 114 S. Ct. at 1910.

286. *Id.* at 1911.

287. *Id.*

288. *Id.* at 1912.

289. *Id.* at 1910-11.

290. *Id.* at 1911 (citing 40 CFR 131.3(b)). 40 CFR § 131.11(b)(2) (1982) establishes that only those criteria governing "toxic pollutants listed pursuant to section 1317(a)(1)" must be set in numerical form. *Id.*

criteria.²⁹¹ Justice Thomas' dissent, joined by Justice Scalia, complained that if states are allowed to condition 401 certification on the maintenance of designated uses, limitless state power to regulate hydroelectric projects according to abstract objectives will supplant the traditional regulatory structure of the FPA.²⁹²

Tacoma argued that the CWA only refers to protection of water "quality" and does not authorize states to regulate hydroelectric projects for the maintenance of water "quantity."²⁹³ Some environmentalists had presumed such a distinction since the passage of the CWA.²⁹⁴ However, the Court deemed this an "artificial distinction."²⁹⁵ The CWA recognizes that reduction in water quantity can constitute water pollution.²⁹⁶ The Act defines pollution as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," and section 304 "recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams.'"²⁹⁷

Tacoma resorted to one of the states' old tactics to allege that the CWA did not allow regulation of water quantity.²⁹⁸ The appellant asserted that two savings clauses in the CWA prevent the federal government from exerting any authority that is not explicitly enumerated in the provisions of the Act.²⁹⁹ Tacoma used the state court's finding that the adoption of section 303 water quality standards is not state action since it is mandated by a federal statute.³⁰⁰ If the federal government acted through the state to regulate water quantity, Tacoma argued, the federal government would overstep the bounds of its

291. *Id.* at 1912. The Court noted that, under such a stringent system, oversight of particular elements of this complex scheme might render a waterbody unsuitable for desired use. *Id.* at 1911-12.

292. *Id.* at 1918.

293. *Id.* at 1913. Tacoma's effort to restrict state authority under section 303 of the Clean Water Act to the regulation of water "quality" (which was supported by the dissent) can be juxtaposed to attempts by proponents of state rights to restrict the bounds of federal authority under the auspices of the navigation interest in the 1940s.

294. See, e.g., Blumm, *supra* note 59, at 114 n.9.

295. *Jefferson PUD*, 114 S. Ct. at 1912.

296. *Id.* at 1913 (citing 33 U.S.C. §§ 1362(19) and 1314(f) (1982)).

297. *Id.*

298. *Id.*

299. *Id.* (citing 33 U.S.C. §§ 1251(g) and 1370(2)). "Section 101(g) provides 'that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.'" *Id.* (citing 33 U.S.C. § 1251(g)). Section 510(2) similarly states "that nothing in the Act shall 'be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such states.'" *Id.* (citing 33 U.S.C. § 1370).

300. *Jefferson PUD*, 114 S. Ct. at 1913 (citing Brief for Petitioners at 39).

power, since the CWA did not specifically authorize such regulation.³⁰¹ The logical result of this argument is that states implementing this federal mandate have only limited authority to condition water use according to the CWA, and the balance of that authority is reserved to those states. Although this argument may seem specious, since the state is explicitly allowed nearly full regulatory power in one form or another, the implications of this formalistic determinism are noteworthy. If those authorities that are not explicitly designated to the states under the CWA must be supplemented by provisions of state law, then any action that is not based on specific authority from the federal statute could be subject to the preemptive authority of the FPA.³⁰²

The Court found it "peculiar" that petitioner would claim that the CWA prevents the states from regulating streamflow when it expressly preserves the states' authority to allocate water rights.³⁰³ Drawing analogies to the savings clause of the FPA, the Court ruled that the savings clauses of the CWA "preserve the authority of states to allocate water quantity as between users" but do not "limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."³⁰⁴ In a strange twist of fate, Justice O'Connor cites *First Iowa* and quotes *Rock Creek* in support of the majority's conclusion that "'minimum stream flow requirements neither reflect nor establish proprietary rights' to water."³⁰⁵ It is unclear whether the Supreme Court views 401 certification proceedings as state or federal action. In fact, the Court dodged that question by raising the familiar proprietary rights discussion. Nevertheless, it is evident that *Jefferson PUD* reestablishes a state's authority to regulate water quality for sustenance of multiple uses, a power that the Court had effectively stripped from the states in 1946 through its interpretations of the FPA.³⁰⁶ Tacoma recognized this great shift in the tide of regulatory power and resisted it with all its litigatory might.

Since FERC had yet to issue a license for the Elkhorn Project, the Court found that there was no conflict between state certification authority under section 401 of the CWA and FERC's licensing authority under the FPA.³⁰⁷ Accordingly, it decided that the issue of resolving such a conflict was not ripe for review.³⁰⁸ Since the Court's opinion indicates that certiorari was granted

301. *Id.*

302. *See supra* note 199.

303. *Jefferson PUD*, 114 S. Ct. at 1913.

304. *Id.*

305. *Id.* (quoting *Rock Creek*, 495 U.S. 490, 498 (1990)).

306. *See supra* note 83 - 113 and accompanying text.

307. *Jefferson PUD*, 114 S. Ct. at 1914.

308. *Id.*

to resolve conflicting rulings on this question in the state courts of last resort, this decision is surprising.³⁰⁹ The dissent claimed that “[t]he Court’s interpretation of section 401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act.”³¹⁰ Justice Thomas’ opinion argued that *Rock Creek* and *First Iowa* determine FERC’s exclusive power to license hydropower facilities according to a comprehensive plan of development which should not be encumbered by contrary state objectives.³¹¹ Since federal courts had uniformly prohibited FERC from altering or reviewing 401 conditions,³¹² and FERC had acknowledged this restriction on its jurisdiction,³¹³ the dissent noted that new found state certification powers would determine a project’s feasibility and thereby alter the balance of state and federal authority dramatically.³¹⁴ In a last effort to preserve the dominance of FERC’s licensing power, the dissent cited the 1986 amendments to the FPA, at section 10(j)(1), arguing that FERC has discretion to adopt or refuse conditions established by state agencies.³¹⁵ However, Washington’s Supreme Court properly indicated that section 10(j)(1) is only applicable to recommendations offered by state or federal fish and wildlife agencies and does not authorize FERC to discard conditions of 401 certifications.³¹⁶

The focus of *Jefferson PUD* allowed the United States Supreme Court to ease its way toward the recognition of state authority to regulate hydroelectric projects without repudiating prior rulings in *First Iowa* and *Rock Creek*. The CWA provided a convenient vehicle for this transition, as Congress developed

309. *Id.* at 1908.

310. *Id.* at 1919 (citing 16 U.S.C. § 791(a)).

311. *Id.* at 1919-20 (citing *Rock Creek*, 495 U.S. at 506-507, and *First Iowa*, 328 U.S. at 164). See *supra* note 83 - 201 and accompanying text. FERC is allowed exclusive authority to “balance a number of considerations” including “the purposes of energy conservation . . . the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” *Id.* at 1919 (citing 16 U.S.C. § 797(e)).

312. See, e.g., *Keating v. Federal Energy Regulatory Comm’n*, 927 F.2d 616, 622 (D.C.Cir. 1991) (Federal review is inappropriate because a decision to grant or deny 401 certification “presumably turns on questions of substantive state environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.”); *Department of Interior v. Federal Energy Regulatory Comm’n*, 952 F.2d 538 (D.C. Cir. 1992); *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007 (3d Cir. 1988).

313. See *supra* note 225 and accompanying text.

314. *Jefferson PUD*, 114 S. Ct. at 1920.

315. *Id.* at 1921 (citing 16 U.S.C. 803(j)(1)).

316. *State of Washington, Dep’t of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646, 655 (Wash. 1993). See *supra* notes 262 - 265 and accompanying text.

new priorities for the management of water resources.³¹⁷ The dissent warns that the Court has an obligation to foresee the likelihood that congressional authorizations of power will come into conflict as a result of this ruling and an obligation to resolve such disputes of authority.³¹⁸ However, the Court's careful adherence to established preemption doctrine and its unwillingness to find any conflict in *Jefferson PUD* provide a victory for state rights and the environment. At the same time, *Jefferson PUD* does not indicate that states will have unrestricted authority to veto federally-authorized hydroelectric projects. Since this case did not involve a FERC license, the question remains as to what will happen when FERC licensing provisions conflict with a state's 401 certification. Future litigation may resolve this question. One case is developing in Tunbridge, Vermont.

IV. THE TUNBRIDGE CASE: FERC WAVERS ON STATE 401 CERTIFICATION AUTHORITY

A. FERC's Challenge

On October 15, 1990, the Tunbridge Mill Corporation (TMC) applied to the Vermont Agency of Natural Resources (VANR) for water quality certification according to section 401 of the CWA.³¹⁹ TMC proposes to renovate the historic Tunbridge Mill, a nineteenth century water-powered grist and sawmill complex on the First Branch of the White River in Tunbridge, Vermont.³²⁰ The existing structure, which is listed on the National Register of Historic Places, consists of mill buildings, a concrete gravity dam about 104 feet long by 8.5 feet high, an intake, a canal, a blacksmith shop, and a barn.³²¹ Along with the renovation of the existing facilities, TMC proposes to add a new penstock, a powerhouse, a tailrace, and an eighty foot long transmission line.³²² In its final form, this small production facility is expected to produce 394 megawatt hours of electricity annually, enough to

317. On November 30, 1994, United States Senator Wallop proposed "Legislation to Overturn the Tacoma Decision." S. Rep. No. 2566, 103rd Cong., 2d Sess. (1994). Mr. Wallop characterized the Tacoma ruling as a "pernicious" plot of the EPA and the Department of Justice to continue the Administration's "assault on federalism and particularly on State jurisdiction and control over water resources." *Id.* at 15239. Among other suggestions, the Senator proposed to amend sections 303 and 401 of the CWA so that neither will authorize states to "regulate water use or water quantities." *Id.* at 15240. Although that bill was not considered in the 103rd Session of Congress, it may arise for future deliberation.

318. *Jefferson PUD*, 114 S. Ct. at 1921.

319. Order, *supra* note 11, at 6.

320. *Id.* at 1.

321. *Id.* at 2.

322. *Id.*

serve forty residential customers or a small shopping mall in the Vermont climate.³²³

The First Branch of the White River is an important fish nursery stocked with juvenile salmonids, including the Atlantic salmon.³²⁴ In its current condition, the Tunbridge Mill does not prohibit the migration of salmon because the downriver Bellows Falls dam blocks upward migration; downstream migrants are able to spill over the Tunbridge spillway and are then collected at Bellows Falls.³²⁵ Similarly, the proposed project will not impair fish migration patterns unless the Bellows Falls dam is removed.³²⁶ This small-scale renovation project will cause little adverse environmental impact, and therefore provides a good opportunity for FERC to challenge state regulatory authority in the aftermath of *Jefferson PUD*.

On September 25, 1991, VANR issued its 401 certification for the Tunbridge project and set seventeen conditions for operation of the facility.³²⁷ On June 15, 1992, VANR added an eighteenth condition.³²⁸ Most of the conditions establish requirements for optimal environmental design, planning, construction, and operation of the project.³²⁹ These substantive provisions include minimum flow requirements, a plan for monitoring flow releases, a plan for erosion control during construction, construction of an upstream fish passage, discharge prohibitions (including petrochemicals, wet concrete and trashrack debris), drawings of the project, public access for utilization of public resources, and access for inspections.³³⁰ Some other conditions are procedural, indicating that Vermont intends to maintain some authority over operating procedures at the Tunbridge project.³³¹ These include a provision that the state must approve a plan for downstream fish passage prior to any construction at the site, a condition that Vermont must approve satisfactory compliance with virtually all other conditions of the certification before construction can commence, a requirement that the state must review and approve any significant future changes to the facility or its operation, and a reopener clause which reserves the state's right to alter terms and conditions

323. FERC, Environmental Assessment for Project No. 11090-000 at 1 (January 29, 1993).

324. Order, *supra* note 11, at 3.

325. *Id.*

326. *Id.*

327. Water Certificate for Tunbridge Mill Corporation, P.L. 92 - 500, section 401 (1991).

328. Order, *supra* note 11, at 6 (noting addition of criteria R).

329. *Id.* at 4-13.

330. *Id.*

331. *Id.*

as necessary to protect water quality.³³² After some resistance, TMC accepted these conditions.³³³

In 1991, TMC also filed an application for a FERC license.³³⁴ In response to this request, FERC conducted a Safety and Design Assessment as well as an Environmental Assessment of the proposed project.³³⁵ In order to maintain the aesthetics and auditory quality of the project, FERC staff recommended that TMC be required to spill at least twelve cubic feet per second (cfs) of water over the crest of the dam at peak recreational times in the spring and fall.³³⁶ That requirement is incorporated in the FERC license as later issued.³³⁷ According to section 18 of the FPA, which allows the Secretary of the Interior (Interior) or the Secretary of Commerce to condition federal licenses on the construction and operation of fishways, FERC inserted five conditions from Interior into the license, including construction of a downstream fish passage, preparation of plans for monitoring and maintenance of upstream and downstream fishways, and access for inspections by the Fish and Wildlife Service.³³⁸ Interior also recommended a continuous minimum flow of 23 cfs throughout the year, and FERC mandated that level of flow until an upstream fish passage facility is operational, at which time FERC will require a minimum flow of 30 cfs in the bypass reach.³³⁹ Pursuant to section 10(a) of the FPA, FERC received twenty-one comprehensive management plans for the First Branch of the White River from state and federal agencies and reviewed eight that were deemed relevant, finding no conflict with the Tunbridge Project as planned.³⁴⁰ Finally, pursuant to sections 4(e) and 10(a)(1) of the FPA, FERC established a comprehensive development plan, but that plan only considers the financial feasibility of the proposed project.³⁴¹ Despite FERC's failure to plan comprehensively for anything more than economic sustainability of the Tunbridge renovation, the Commission was careful to satisfy most of its responsibilities under the FPA. This precise review of the Tunbridge project sets the Commission in good standing to challenge Vermont's 401 certification.

332. *Id.*

333. David Gram, *Federal Order Enrages Groups: Some Say Locals Should Rule on Rivers*, THE VALLEY NEWS, August 19, 1994, at A2.

334. Order, *supra* note 11, at 1.

335. *Id.*

336. *Id.* at 5.

337. *Id.*

338. *Id.* at 3.

339. *Id.* at 4-5.

340. *Id.* at 13.

341. *Id.* at 15.

The FERC Licensing Order first addressed whether a federal agency has authority to review the appropriateness of 401 certification conditions.³⁴² The Commission acknowledged its past rulings that state courts have sole jurisdiction to pass on 401 certifications.³⁴³ Nevertheless, the Commission repudiated those prior holdings and ruled that section 401 only authorizes states to impose conditions that pertain to water quality.³⁴⁴ Moreover, FERC's order assured that the Commission has authority to determine whether specific conditions are related to water quality and should become terms in the federal license.³⁴⁵ In support of that conclusion, the Order cites the Supreme Court's reading of section 401(d) in *Jefferson PUD*.³⁴⁶ Since section 401(d) indicates that certifications shall ensure compliance only with "relevant sections of the CWA and appropriate requirements of state law," FERC concluded that Vermont's discretion to impose conditions must be restricted.³⁴⁷ The Commission then misconstrued the Supreme Court's broad reading of state authority to "promote water quality."³⁴⁸ FERC is correct in its assertion that "the [United States Supreme] Court in no way indicated that conditions that were not related to water quality were lawful," but it does not follow that FERC is allowed full discretion to determine whether conditions pertain to water quality and are lawful.³⁴⁹ In fact, according to *Jefferson PUD*, the CWA allows states broad discretion to define water quality pursuant to chemical criteria and designated uses.³⁵⁰ In light of the Licensing Order's misrepresentation of *Jefferson PUD*, it is clear that FERC relies on traditional interpretations of preemptive federal authority under the FPA in its effort to rekindle federal review power.

FERC's licensing order raises the issue that was reserved by the Supreme Court in *Jefferson PUD*.³⁵¹ It states that "the Court did not reach the issue of whether conditions that might otherwise be appropriate could be deemed unenforceable if they conflicted with [the Commission's] determination of the public interest under the FPA."³⁵² Since the Supreme Court's reading of the

342. *Id.* at 7-8.

343. *Id.* at 6. See also *supra* notes 225 - 228 and accompanying text.

344. Order, *supra* note 11, at 7.

345. *Id.*

346. *Id.* at 8.

347. *Id.*

348. See *supra* notes 277 - 284 and accompanying text.

349. Order, *supra* note 11, at 9.

350. *Jefferson PUD*, 114 S. Ct. at 1908-14 (interpreting §§ 33 U.S.C. 1251, 1313, 1314, 1341, 1362, 1370). See *supra* notes 277 - 297 and accompanying text.

351. See *Jefferson PUD*, 114 S. Ct. at 1907-08. See *supra* notes 307 - 309 and accompanying text.

352. Order, *supra* note 11, at 9.

FPA determined that the Commission has the paramount role in the hydropower licensing process, FERC decided that the issue of "whether certain state conditions are outside the scope of section 401(d) is a federal question to be answered by the Commission."³⁵³ After setting out this rationalization for FERC's authority to review and reject Vermont's 401 certification conditions that are not related to water quality, the Order considered all of the conditions VANR set for the Tunbridge Project.³⁵⁴ FERC did not overturn any of the substantive conditions in the 401 certification. Most of the substantive requirements are clearly related to water quality concerns; those that are not seem to be tolerated for convenience, because the stipulations are often duplicated in the FERC license.³⁵⁵ For example, condition N requires public access to the project grounds for utilization of public resources.³⁵⁶ Although such access does not seem to provide for water quality, the provision is accepted, probably because Articles 13 and 411 in FERC's license allow such access.³⁵⁷ Another condition requires TMC to maintain a minimum spill flow of 15 cfs over the dam during the first ten years of operation; FERC accepts that condition without questioning whether aesthetic concerns relate to water quality.³⁵⁸ Moreover, FERC's Order indicates that the Commission "determined independently that the public interest demands a higher minimum flow" and cites its requirement that TMC maintain a continuous spill of 23 cfs in Articles 404 and 406 of the license.³⁵⁹

While indicating its willingness to uphold and increase Vermont's substantive requirements for the Tunbridge Project, the Commission was unwilling to incorporate three procedural conditions of the 401 certification into the license.³⁶⁰ In the Licensing Order, FERC recklessly applied its newly developed "water quality" standard of review to edit out any 401 conditions that vest the state with continuing power to affect operations at the Tunbridge Project.³⁶¹ The three conditions that FERC rejected would enable Vermont to review and approve operational standards:

353. *Id.* at 8.

354. *Id.* at 9-13.

355. *Id.*

356. *Id.* at 12.

357. *Id.*

358. *Id.* at 13.

359. *Id.*

360. *Id.* at 10-13.

361. *Id.*

Condition J: Any significant changes to the project, including project operation, must be submitted to the [Vermont] Department of [Environmental Conservation] for prior review and written approval.

Condition L: No construction may commence until after the Department has issued written approval under conditions B, C, D, and J and until Fish and Wildlife has issued written approval under E. Operation changes made after project completion are subject to Condition I and must be approved prior to effecting the change.

Condition P: The Department is reserving the right to add and alter terms and conditions as appropriate to carry out its responsibilities during the life of the project with respect to water quality.³⁶²

The Commission refuses to incorporate Condition J, arguing that it would allow the state to "revisit its certification," while section 401(a)(3) of the CWA provides that modifications of state certifications must be initiated by the federal licensing agency not by the state.³⁶³ FERC does not base its power to review Condition J on the grounds that it does not pertain to water quality but rather on a finding that the provision is inconsistent with section 401. FERC also rejects Condition L, alleging that section 401 does not authorize the state "to halt or order construction of the Tunbridge Mill Project."³⁶⁴ Although section 401 enables the state to issue a certification and requires FERC to include such certification as part of its federal license, FERC argues that the CWA does not authorize the state to control the timing of activities under the license.³⁶⁵ Again, FERC does not consider the condition's relevance to water quality but decides on the basis that the condition affords the state powers that are "beyond the scope of section 401."³⁶⁶ Finally, FERC rejects the reopener provision at Condition P, because similar to condition L, it allows the state "unilateral authority to alter its certification," which the Commission says is inconsistent with section 401.³⁶⁷ The Commission's refutation of Condition P without any reference to water quality issues makes it clear that the agency's review procedure has little regard for the condition's relevance to water quality. Condition P states

362. Application, *supra* note 12, at 1-2.

363. Order, *supra* note 11, at 11 (citing 33 U.S.C. § 1341(a)(3)). In fact, section 401(a)(3) does allow FERC primary authority to initiate modifications of 401 certifications but only if the licensee has provided the certifying State with notice of any proposed change that may result in violation of relevant sections of the CWA. 33 U.S.C. § 1341(a)(3).

364. *Id.* at 12.

365. *Id.*

366. Application, *supra* note 12, at 9.

367. Order, *supra* note 11, at 12.

that the Department of Environmental Conservation will only alter conditions of the 401 certification when such alterations are necessary to preserve water quality.

In the face of impending reauthorization decisions for FERC licenses throughout the Nation and a Supreme Court interpretation of the CWA which redistributes authority over such determinations, the Commission struggled to justify its retention of preeminent authority over the nation's hydropower supply. Meanwhile, critics challenge the Commission's findings.

B. Countering FERC's Tunbridge Initiatives

VANR and American Rivers, Inc. each filed petitions for rehearing of FERC's decision on August 15, 1994.³⁶⁸ Both parties also filed subsequent motions for late intervention in the decision.³⁶⁹ The interveners say they do not intend to obstruct operation of the project or seek a stay of FERC's Licensing Order.³⁷⁰ They only oppose FERC's refusal to incorporate three of the state's conditions for 401 certification.³⁷¹ The petitioners do not wish to promote a veto power over the Commission's licensing decision, but they seek to balance the State's right to protect water resources with the nation's right to power sources.

The interveners challenge FERC's ruling on three grounds: 1) FERC does not have jurisdiction to refute conditions established under section 401; 2) FERC's decision to refuse those conditions represents a violation of their administrative responsibilities; and 3) FERC did not have adequate substantive reasons to deny the three procedural conditions.³⁷² First, the challengers note that section 401(d) provides that any condition set forth in a water quality certificate "shall become a condition on any Federal license" and therefore does not allow the Commission to exercise administrative discretion on this matter.³⁷³ The word "shall" is mandatory in nature, according to the United States Supreme Court.³⁷⁴ The interveners contend that FERC's decision to review the conditions of Vermont's 401 certification for the Tunbridge project

368. Rehearing, *supra* note 16.

369. *Id.*

370. Margaret Bowman, Stipulation of State of Vermont, Tunbridge Mill Corporation, American Rivers, Inc., and Catherine D. Boretos (September 1, 1994) at 1.

371. *Id.*

372. See generally Application, *supra* note 12; Petition by Catherine D. Boretos and American Rivers, Inc. for Rehearing (August 15, 1994) [hereinafter Petition].

373. Application, *supra* note 12, at 2-5; Petition, *supra* note 375, at 2.

374. Application, *supra* note 12, at 2-5 (citing *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765 (1984) (Federal licenses must contain state conditions for 401 certification.)).

enables it to administer implementation of water quality standards, a task that the CWA delegates to the states.³⁷⁵

The interveners also argue that FERC's rejection of the aforementioned three conditions represents an abuse of its administrative responsibilities.³⁷⁶ Vermont and American Rivers allege that the Commission's decision violates the Administrative Procedure Act (APA).³⁷⁷ FERC did not develop any procedure for its review of water quality certifications, it did not provide opportunity for public comment on this issue, and it did not base its decision on Vermont's record for the issuance of the 401 certification.³⁷⁸ Altogether, the interveners allege that the Commission's findings were not based on substantial evidence and was therefore arbitrary and capricious, in violation of the APA.³⁷⁹ American Rivers also contends that FERC's Order violates the National Environmental Policy Act's requirement that federal agencies must address inconsistencies between their actions and state law and seek to reconcile any reconcilable differences.³⁸⁰

VANR further states that all three of the denied conditions are oriented towards protection of water quality.³⁸¹ Condition J requires that the Vermont Department of Conservation review and approve any proposals for significant changes at the project; this allows the state and the Commission to plan for effective resource management.³⁸² Condition L prohibits construction at the project until Vermont's Department of Environmental Conservation approves plans for the preservation of water quality during construction, because advanced planning is necessary to minimize water degradation from such activities.³⁸³ Finally, Condition P is a reopener clause that is limited by its own terms to issues regarding water quality.³⁸⁴ The interveners add that conditions L and P have yet to be implemented and are not ripe for agency or judicial review, since it is too early to determine their impacts on water quality.³⁸⁵

On these three grounds, FERC's challengers press the agency for rehearing. American Rivers also emphasizes that FERC was clearly trying

375. Application, *supra* note 12, at 6.

376. *Id.* at 9. See also Petition, *supra* note 372, at 2-3.

377. Application, *supra* note 12, at 9.

378. Application, *supra* note 12, at 9-10.

379. *Id.* at 10 (citing *Allegheny Elec. Coop. v. Federal Energy Regulatory Comm'n*, 922 F.2d 73, 80 (2d Cir. 1980) (Commission decisions must be supported by substantial evidence.)).

380. Petition, *supra* note 372, at 2 (citing 40 C.F.R. § 1506.2(d)).

381. Application, *supra* note 12, at 9-12.

382. *Id.* at 11.

383. *Id.* at 11-12 (citing *Roosevelt*, 684 F.2d at 1056).

384. *Id.* at 12.

385. *Id.* See also Petition, *supra* note 372, at 3.

a legal issue that was reserved by the United States Supreme Court in *Jefferson PUD*, "the reconciliation of a certification and a license, when perceived to be in conflict."³⁸⁶ VANR alleges that the public interest is embodied not only in the FPA but also in the CWA and other environmental statutes which must be allowed equal stature.³⁸⁷ However, the interveners have not addressed the preemption issue squarely, and they have not confronted the question of whether 401 certifications are state action. These issues are of great national significance. FERC acknowledged that this discourse demands input from a variety of interest groups when it allowed a rehearing of its decision on September 14, 1994.³⁸⁸

Although FERC has yet to hold its rehearing for the Tunbridge decision, the Commission has invoked its ruling from the Tunbridge case as a justification for refusing to incorporate 401 certification conditions in federal licenses for other hydroelectric facilities.³⁸⁹ FERC should rehear the Tunbridge decision before it exercises a legally unsubstantiated review power over other 401 certifications.

C. Analysis of the Tunbridge Case

FERC does not have jurisdiction to review state certifications under section 401 of the Clean Water Act. The language of section 401(d) expressly states that each provision in such certificates "shall become a condition on any federal license or permit."³⁹⁰ The Commission has acknowledged this limit to its review powers in its past decisions,³⁹¹ and the federal courts have consistently and uniformly upheld this ruling.³⁹² In *Keating v. Federal Energy Regulatory Commission*, the United States Court of Appeals for the District of Columbia Circuit held that federal review of

386. Petition, *supra* note 372, at 4 (citing *Jefferson PUD*, 114 S. Ct. 1900).

387. Application, *supra* note 12, at 5.

388. Rehearing, *supra* note 16.

389. FERC, Order Issuing Subsequent License (Minor Project), Project No. 2489-001, at 3-7 (Nov. 4, 1994) (citing Tunbridge Mill Corporation 68 FERC § 61,018 (1994) (grounds for rulings that "states may lawfully impose only conditions related to water quality," that section 401 does not authorize the state to control the timing of maintenance or repair activities, and that modifications of state certifications must be initiated by the Commission rather than the state)); FERC, Draft Environmental Impact Statement for the Lower Penobscot River Basin in Maine (including FERC projects 10981, 2712, and 2534) at vii, 5-26 (Nov. 1994) (citing Tunbridge Mill Corporation, 68 FERC 61,076 (1994) (for propositions that "under section 401(d), states may lawfully impose only conditions related to water quality," and that section 401 does not authorize states to "halt or order construction of the projects"))).

390. 33 U.S.C. § 1341(d).

391. See *supra* note 225 and accompanying text.

392. See, e.g., note 314 and accompanying text.

401 certifications is inappropriate because a decision to grant or deny such certification "presumably turns on questions of substantive state environmental law -- an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence."³⁹³ FERC's decision to expand its power of review cannot stand in the face of express statutory language to the contrary and the precedential authority of past rulings from the agency and federal courts.

The immediate issue raised by *Jefferson PUD* is whether state authority to condition FERC licenses should be unlimited, so that state agencies effectively assume control over hydropower development and management. Even environmentalists acknowledge that states should not be granted total control over the development of hydropower resources.³⁹⁴ The CWA is oriented towards one objective, water quality, and does not enable or prepare the states to consider broad-based energy needs in its certification decisions. The FPA allows the federal government to further its interests in waterpower, and the extraction of electricity from renewable resources serves at least some of the nation's interests.³⁹⁵ If states are allowed to exercise total control over hydropower, some may refuse to allow appropriate levels of power development on their rivers and thereby force other states to produce more than their fair share of hydroelectric power.³⁹⁶

One commentator claims that, while FERC and federal courts do not have the power to review a state's initial 401 certifications, once the federal license is granted, revocations or amendments of the state certification should be considered federal actions subject to federal review.³⁹⁷ Under this theory, the role of the state and its courts would end once the state has granted certification.³⁹⁸ Vermont's certification for the Tunbridge project would stand, but the substance of Conditions J, L, and P could become inconsequential, since any state decision to disapprove subsequent operational procedures at the project could be overruled upon FERC review. FERC would retain sole authority to regulate facility operations after the 401 certification is issued. The commentator cites *Keating* for the rule that federal agencies and courts cannot review 401 certifications at the point of license issuance, but states cannot revoke prior certifications without FERC's consent

393. *Keating*, 927 F.2d at 622.

394. See Plouffe, *supra* note 8, at 843. See also Fischer, *supra* note 114, at 1245-46.

395. Plouffe, *supra* note 8, at 843.

396. *Id.*

397. Bogardus, *supra* note 225, at 94-99.

398. *Id.* at 95.

according to the 401(a)(3) criteria.³⁹⁹ There is a clear distinction between revocation and modification of a 401 certification. States would be unable to maintain water quality if they were not allowed to modify 401 certifications along with changes at the licensed site. Such a result would be inconsistent with the purposes of the CWA. The modification of 401 certifications should not invoke federal review power.

Preemption analysis provides another possible means to balance federal and state authority over hydroelectric development. If, as the *Keating* ruling suggests, states are better prepared to review 401 certifications because such decisions are based on "substantive state law," then the act of 401 certification may be interpreted as state action subject to federal preemption.⁴⁰⁰ A finding of federal field would not be possible, since the CWA and *Jefferson PUD* indicate that Congress and the courts no longer intend for the FPA to fully occupy the field of hydropower regulation to the exclusion of state concerns for water quality.⁴⁰¹ Nevertheless, state conditions could be barred under a conflict preemption analysis if it is impossible to comply with both FERC license provisions and the state requirements.

The problem with this test is that it raises the question of who will determine whether there is a sufficient conflict to invoke federal preemption. As previously demonstrated, the substantive balance of the scales can vary significantly depending on who is conducting the procedural balancing.⁴⁰² It is also unclear how the reviewing authority will determine whether particular state conditions are so burdensome on a federal license that they conflict with federal authority. As a collective whole, a certification could be shown to make a project unfeasible, but it would be difficult to single out particular conditions that would have such an effect. If the court were enabled to find preemption based on the collective impact of all the certification conditions, the states' capacity to protect water quality through 401 certifications would be significantly impaired. The CWA does not suggest that states should be required to work within such strict parameters when they regulate for water quality. Therefore, it will be necessary to delineate the bounds of certification review power, as well as to describe some structure that will ensure a methodical application of the preemption analysis.

FERC's Licensing Order for the Tunbridge project claims that state power should be limited to 401 certification provisions that pertain to water

399. *Id.* at 95-96 (citing *Keating*, 927 F.2d at 623-24). The two conditions for state revocation are timeliness and a change in circumstances since the issuance of the original license or permit. *Keating*, 927 F.2d at 624.

400. *Keating*, 927 F.2d at 622. See also *supra* note 196 for discussions of preemption.

401. See *supra* Part III.

402. See *supra* at note 92 - 94 and accompanying text.

quality.⁴⁰³ Although the Commission abused its review power over Vermont's 401 certification for the Tunbridge project, the "pertinence to water quality" standard may provide an effective means to balance state and federal authority over hydroelectric licensing. The *Jefferson PUD* decision indicates that the Supreme Court is willing to tolerate broad constructions of state interest in "water quality."⁴⁰⁴ *Jefferson PUD* allows states to determine appropriate uses of their waterways and to condition FERC licenses in any way necessary to support those uses.⁴⁰⁵ As long as states are acting within the broad realm of discretion to protect water quality according to state standards, review power should remain with the state courts.

This result does not necessarily suggest that state certification power may be exercised to the detriment of federal energy planning policies. Once states have turned to their citizens to determine the most appropriate, designated uses for specific waterways and have established water quality standards accordingly, state courts should review 401 certifications in light of their consistency with those designated uses. If a particular condition does not provide for the designated uses of a waterway, state courts should invalidate that condition.

The remaining issue is whether states and their citizens will consider local and national energy needs when they regulate for water quality. FERC should use its comprehensive planning power to ensure that states are aware of their need to help alleviate the nation's energy burden.⁴⁰⁶ The Commission should prepare a hydropower plan for the nation and should propose annual hydropower production levels for each state. It must be willing to accept information from diverse sources of interest to ensure that its plan is both comprehensive and equitable. Comprehensive national planning will help provide the states and the public with adequate information and foresight for sound local energy planning.

Under this scheme, jurisdiction will correspond with the range of effects of the entity's decision; FERC will assume responsibility for federal energy planning policies while states and citizens will retain discretion to plan for local resource use.⁴⁰⁷ When faced with the duty of satisfying energy needs

403. Order, *supra* note 11, at 7. See *supra* notes 352 - 367 and accompanying text.

404. *Jefferson PUD*, 114 S. Ct. 1900. See *supra* note 274 - 309 and accompanying text.

405. *Jefferson PUD*, 114 S. Ct. 1900.

406. As a component of this responsibility, FERC should consult with other federal agencies to determine what portion of the nation's energy supply should be provided from hydropower.

407. One commentator notes that "[i]deally, the geographic jurisdiction of an agency or governmental entity should be coterminous with the range of effects of the entity's decision." Getches, *supra* note 5, at 136. Two recent developments in Vermont indicate that such a balancing of federal and state interests is achievable and can win mutually agreeable (although sometimes compromised) results. On the Deerfield River, four federal agencies, eight public interest groups, and

while preserving water quality, the states and their citizens will face the repercussions of energy consumption and will take responsibility for efficient and sustainable use of their water. One commentator has stated that "the public is learning the serious consequences and trade-offs involved in committing water to one use as opposed to another use. . . . Once citizens are armed with the facts about the consequences of a water decision . . . they are willing to make hard choices and even sacrifices."⁴⁰⁸ Citizens will not fully appreciate the total cost of excessive energy consumption until they realize such planning power.

CONCLUSION

The debate over energy policy raises some of the most fundamental issues of environmental reform. The controversy over future management of hydroelectric power and the river treasure is indicative of a changing human perspective: a recognition that "natural resources" are not merely resources fit for exploitation but are also priceless public benefits needing preservation. Prior to large-scale industrialization, water management decisions occurred at the private level and were monitored infrequently through state invocation of the common law doctrines of riparianism and prior appropriation. The Federal Power Act marked a new era of public decision-making, when a river's value for energy production became the impetus for federal regulation in the public interest. During heavy industrialization, the federal government led the American people through rapid power development, tapping into national resources without ample consideration of cost at the local level. As critical policy determinations were made by federal agencies, local citizens reaped the benefits of unprecedented industrial development while sacrificing a sense of responsibility for the repercussions of over-consumption. Now, in a post-industrial era, these same citizens are realizing the social and environmental costs of energy consumption, as hydropower infringes on

the New England Power Company (NEPCO) negotiated an agreement whereby NEPCO pledged to protect more than 18,000 acres of land it owns along the river, to increase minimum flows on "dryway" sections, to provide a guaranteed number of whitewater releases, and to protect wildlife habitat in exchange for a renewed FERC license to continue drawing power at the site. AMC OUTDOORS, Dec. 1994, at 18-20. On February 8, 1995, FERC issued a Draft Environmental Impact Statement for the Number 11 dam on the Clyde River in which, for the first time ever, the Commission recommended that the dam should be removed for environmental reasons. Lawrence Pyne, *Effort to Save Clyde Salmon*, BURLINGTON FREE PRESS (Burlington, VT), Feb. 10, 1995, at A1. The report states that "[a]ny re-powering alternative would have to be evaluated in light of the environmental enhancements obtained by dam removal without repowering." *Id.* at 6A. Consequently, Citizens Utilities has amended its application for FERC relicensing to propose removal of the Number 11 dam. *Id.*

408. Getches, *supra* note 5, at 144-145.

diverse public demands for river use. As a manifestation of newfound public interest in planning policy, the Clean Water Act returns authority to the states to regulate water quality, thereby facilitating citizen involvement in decisions to plan for sustainable use of local waters. While new concerns for sustainable resource allocation clash with traditional federal incentives and controls for power development, the decision for this country is not whether these interests can be reconciled, because federal legislation determines that they must be. Rather, the question is who will take responsibility to work a comprehensive balance.

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